Supreme Court, U.S.
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No. 04 353

In The

Supreme Court of the United States

KEVIN CHRISTOPHER KELLY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Kevin Kelly was convicted of criminal negligence in the death of his infant daughter, Frances. Although Virginia's law of criminal negligence has always required proof beyond a reasonable doubt that a homicide was not improbable under all the facts existing at the time, that the knowledge of such facts should have influenced the conduct of the accused, and that in the face of such knowledge the accused proceeded with reckless indifference to the consequences of his actions – and although Kelly was tried on the basis of that rule – the Court of Appeals of Virginia affirmed his convictions on a novel theory of strict liability that dispensed with such proof. Did this unforeseen and indefensible judicial enlargement of Virginia's criminal law, applied retroactively, contravene the Due Process Clause of the Fourteenth Amendment?

II. The Court of Appeals refused under Virginia Rule 5A:18 to address Kelly's contention that his convictions contravened the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, on the ground that he had not raised that issue in his motions under Virginia Rule 3A:15(a) to strike the Commonwealth's evidence in the trial court. Was this refusal not a valid "independent state ground", but instead a device designed to deprive Kelly of a hearing on his constitutional claims in both the Virginia and especially the Federal courts, inasmuch as the Court of Appeals knew that

•Kelly had presented his constitutional contentions to the trial court in a motion to set aside the verdicts under Virginia Rule 3A:15(b);

QUESTIONS PRESENTED FOR REVIEW – Continued

•under Virginia law contentions raised in a motion to set aside satisfy Rule 5A:18;

•under Virginia law a motion to strike is not a prerequisite to a motion to set aside; and

•the contrary procedural rule the Court of Appeals invoked was not firmly established, had never been consistently or regularly applied, and lacked any fair or substantial support in Virginia law?

III. The Court of Appeals refused under Virginia Rule 5A:18 to address Kelly's contention that use of the testimony of two witnesses contravened the Due Process Clause of the Fourteenth Amendment, because he did not challenge the "[r]elevancy" of their testimony at the time they testified or in his motions to strike. Was this refusal not a valid "independent state ground", but only another device designed to defeat Kelly's constitutional rights, inasmuch as the Court of Appeals knew that

•Kelly had attacked the sufficiency of the testimony both in his motions to strike and in his motion to set aside;

•he had attacked use of the testimony as a denial of due process in his motion to set aside;

•under Virginia law contentions raised in a motion to set aside satisfy Rule 5A:18;

•under Virginia law a prior objection to relevance is not a prerequisite to a challenge to the sufficiency of testimony in a motion to strike or a motion to set aside;

•under Virginia law a motion to strike is not a prerequisite to a motion to set aside; and

QUESTIONS PRESENTED FOR REVIEW – Continued

•the contrary procedural rule the Court of Appeals invoked was not firmly established, had never been consistently or regularly applied, and lacked any fair or substantial support in Virginia law?

IV. Did Kelly's convictions, and the Court of Appeals' affirmance thereof, contravene the Due Process Clause of the Fourteenth Amendment, because the Commonwealth failed to prove beyond a reasonable doubt, as required by Virginia law, that Kelly was aware from his knowledge of existing facts and circumstances that his conduct could result in injury to Frances, and nevertheless proceeded consciously with reckless indifference to the consequences of his behavior, inasmuch as

•the only evidence for the critical period between 12:50 and 4:00 pm (approximately one hour after Frances died) on the day in question established that Kelly reasonably believed she was either in his teenaged children's care or taking a nap;

•Kelly's conduct during the period from 4:00 to 7:30 pm (at which point Frances was discovered dead) on that day cannot be a cause of her death that occurred prior to 4:00 pm; and

•use of the testimony of two witnesses as to events years prior to the day in question violated due process, because their testimony was unquestionably insufficient to prove those events "substantially similar" to the incident *sub judice*, as required by Virginia law, and any reliance on such speculative testimony rendered the charges void for vagueness as applied?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals of Virginia, the judgment of which is here for review, include Petitioner Kevin Kelly, an individual, and Respondent Commonwealth of Virginia.

CORPORATE DISCLOSURE STATEMENT

This Petition is not filed by or on behalf of any nongovernmental corporation, or by any parent or publicly held corporation holding 10% or more of any such corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Kevin Kelly prays for a writ of certiorari to review the judgment the Court of Appeals of Virginia entered on 3 February 2004.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 42 Va. App. 347, 592 S.E.2d 353 (2004). Appendix ("App") at 1a. That court's denial of rehearing *en banc* is unreported. *Id.* at 21a. The Supreme Court of Virginia's denial of Kelly's petition for appeal is unreported. *Id.* at 20a. The Circuit Court for Prince William County's denials of his motions to strike and to set aside the verdicts are unreported. *Id.* at 10a, 17a.

STATEMENT OF JURISDICTION

On 3 February 2004, the Court of Appeals entered the judgment here for review. *Id.* at 1a. On 1 March 2004, that court denied rehearing *en banc*. *Id.* at 21a. On 23 June 2004, the Supreme Court of Virginia denied Kelly's petition for appeal. *Id.* at 20a. This Petition is timely under this Court's Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a). No notification under Rule 29.4(c) has been made, because the Commonwealth of Virginia is a party hereto.

CONSTITUTIONAL PROVISION, STATUTES, COMMON-LAW STANDARDS, AND COURT RULES INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States; Code of Virginia §§ 18.2-36 and 18.2-371.1(B); Virginia's common-law standards of criminal negligence; and Rules of the Supreme Court of Virginia 3A:15, 5:17(c), and 5A:18. The pertinent text appears in App at 22a-26a.

STATEMENT OF THE CASE

A. The Basis for Federal Jurisdiction. Kelly was tried for common-law involuntary manslaughter and violation of Code of Virginia § 18.2-371(B), both of which require proof of criminal negligence. *See* App at 96a-98a, 22a-25a, 6a-7a. In two motions to strike, he attacked the Commonwealth's evidence as insufficient to go to the jury; but the Circuit Court for Prince William County denied his motions. *Id.* at 27a-34a. The jury convicted Kelly on both counts. *Id.* at 99a-102a. His motion to set aside the verdicts argued that they denied him due process under the Fourteenth Amendment because of insufficiency of the evidence and for other reasons; but the Circuit Court denied it, and sentenced Kelly to incarceration, probation, and community service. *Id.* at 35a-70a, 12a-16a. Kelly raised the same arguments in the Court of Appeals. *Id.* at 71a-76a. That court refused to hear any constitutional claims, on the ground that Kelly had raised none in his motions to strike; and it upheld his convictions on a theory of strict liability theretofore unknown in Virginia's law of criminal negligence. *Id.* at 4a-5a, 8a. Kelly petitioned for rehearing *en banc*, demanding that his constitutional

arguments be heard, and challenging the imposition of strict liability. *Id.* at 83a-88a. The Court of Appeals denied his petition. *Id.* at 21a. He then petitioned for appeal to the Supreme Court of Virginia, reasserting his former constitutional arguments, attacking the Court of Appeals' grounds for refusing to hear them, and challenging as a new and separate violation of due process under the Fourteenth Amendment that court's reliance on strict liability. *Id.* at 89a-95a. *See* Virginia Rule 5:17(c), App at 26a. The Supreme Court denied his petition. *Id.* at 20a. This Petition followed.

B. Facts Material to the Questions Presented.[1]

1. On the day in question, Kevin and Mary Kelly were the parents of thirteen children. *Id.* at 108a-09a (opening statements). Mary and her oldest daughter were in Ireland. Kevin Kelly had "t[aken] vacation from work to stay [at home] * * * with the kids", where the situation "ha[d] been very hectic".

a. "At noon", intending to pick up his teenagers at Seton School, Kelly placed his three preschoolers – Martin, Clare, and Frances (then 21 months old) – in his "wife's * * * van because it had car seats". At Seton, Anthony (age 17), Rose (age 16), and Kevin (age 13) "came out fairly promptly but Kate [(age 15)] was delayed".[2] After waiting

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[1] Unless otherwise indicated, this recitation follows Kelly's written statement (with misspellings corrected). Commonwealth's Exhibit 15, App at 103a-05a, 145a-47a. Aside from immaterial discrepancies in other testimony (noted below), these facts are undisputed. Other critical witnesses' testimony, also undisputed, is identified with parentheticals.

[2] At trial, Anthony was identified as "about sixteen". *Id.* at 115a-16a (Joan McIvor), 122a-23a (Brian McIvor). Other ages are provided for reference. Kelly's statement refers to these children as "my older kids" and "the Seton kids".

"until approximately 12:40 pm", Kelly decided to bring home the children with him. "On the ride home [he] instructed [his] older kids to get everyone in the house while [he] went back for Kate." According to Manassas Police Lt. Kevin Colovos, Kelly said that he had "told Anthony to take the children inside". *Id.* at 143a.[3]

Arriving home at 12:50 pm, Kelly parked the van in the street in front of his house.[4] *See id.* at 106a, 117a-18a, 140a-41a (photograph of the scene). This was unusual. *Id.* at 113a, 116a-17a (Joan McIvor). Undisputed is that Kelly did not want to wait for the little children to be removed from the van, and needed to use another vehicle, which the van would have blocked if parked in the driveway. *Id.* at 109a (opening statement). Kelly "departed in [the] other vehicle to go to Seton * * * and also to pick up lunch." *Id.* at 143a (Lt. Colovos). Although Martin and Clare were then brought inside, Frances was left in the van, strapped in her car seat. No evidence explains how this happened.

About 1:10 pm Kelly and Kate returned home. The van – with Frances inside – was parked on the street, later to be discovered by neighbors Joan and Brian McIvor with its doors and windows shut, its doors locked. *Id.* at 112a-15a, 123a-25a. The van's tinted windows made it difficult to notice Frances, except from the front. *Id.* at 114a (Joan McIvor), 120a-21a (Brian McIvor). Also, the van "was parked * * * further away from the driveway than closer to

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[3] The Court of Appeals elided this testimony: "Kelly * * * instructed other children or a sixteen-year-old boy". *Id.* at 8a.

[4] Lt. Colovos testified that Kelly had orally provided him with a slightly different chronology. *Id.* at 143a-44a. Nothing, however, turns on this discrepancy.

it." *Id.* at 119a-20a (Brian McIvor). *See id.* at 106a (scene), 117a (Joan McIvor), 128a-29a (Michael Byrne).

After consulting a repairman about his malfunctioning home air conditioner, Kelly prepared lunch. He "assumed Frances was taking her nap which was normal for early afternoon." The Commonwealth's expert, Dr. Foster, opined that a young child "would most likely, during the course of seven hours in a day, take a nap during that period of time." *Id.* at 175a-76a. Kelly did laundry, then at about 2:40 pm went to pick up his younger children from school, "leaving [his four teenaged children] in charge". Meanwhile, a different air-conditioning repairman drove to the house "right next door" at "right about 3:00 o'clock", saw the van "in front of the [Kellys'] home", and observed it later on. But he never noticed Frances inside. Neither did his co-worker who accompanied him during part of the time he was outside, talking with Kelly. *Id.* at 126-33a (Michael Byrne). Nor, apparently, did anyone else.

The Commonwealth proffered testimony on experiments conducted to estimate the high temperature in the van on the fatal day – a matter no one disputed. But it offered no evidence as to whether anyone could have seen Frances in the van from the house, the yard, or the street; or could have heard her had she cried. *Contrast id.* at 149a-54a (Detective Deramus) *with id.* at 138a (Dr. Field), 176a-77a (Dr. Foster).

The Medical Examiner, Dr. Field, opined that Frances died of heat stroke, and that she could not likely have survived for more than 1-½ to 2 hours. *Id.* at 136a-38a. So, had she been left in the van between 12:50 (when Kelly departed after "instruct[ing his] older kids to get everyone in the house") and 1:10 pm (when he returned), she would

have died between 2:20 and 3:10 pm (12:50 pm *plus* 1-½ hours, and 1:10 pm *plus* 2 hours).

b. Kelly returned home again about 4:00 pm, and proceeded to work on a fence so that his preschoolers could play in his backyard safely. The repairman saw him as "he was helping one of his sons work on the fence", and advised Kelly on how to fix his air conditioner. *Id.* at 127a-32a (Michael Byrne). Between 5:00 and 6:00 pm, the repairman saw him "get in a vehicle that was in the driveway", but "didn't see him drive away". *Id.* at 132a. In fact, Kelly drove to a store to buy "needed materials" to fix his air conditioner. On his return, at 6:10 pm he took a child to soccer practice. Back from that errand, he found that a mess in the house had not been cleaned up, because the "vacuum cleaner was broken". So he "went for the repair piece" and "pizza for dinner". While he was away, at about 7:00 to 7:30 pm the McIvors discovered Frances. Kelly then received a "call * * * telling [him] to come home right away that Frances was left in the car [and] wasn't breathing".

2. Erin and Amber Beacher testified as to events that had occurred years earlier. *Pre*-trial, the Commonwealth argued that their testimony would "show [Kelly] had notice his children were left unattended in * * * locked vehicles * * * and is admissible * * * to show an element of the charged offense"; and that relevant "circumstances must include * * * prior bad acts where [Kelly's] children were endangered by his actions", which "served to give him notice of the danger arising from his conduct." *Id.* at 178a-80a. In fact, Erin Beacher testified only that on "a hot summer day" "[a]bout three or four years ago" she saw a young child in a car seat in the Kellys' van, parked in their driveway. She related another incident "[t]he following

summer" involving a "small child". On both occasions, she "heard a slight crying from the van", went to the Kellys' house, and told Kelly that he had "left a child inside the car". He said "Thank you", and brought the children inside. She did not know who had parked the van. *Id.* at 161a-70a. Amber Beacher testified only that "[t]wo to three years ago", walking by the Kellys' house, she "heard a kid cry", and saw a child of "[t]wo to three" years of age in a car seat in the van. "It was warm out, it wasn't too hot." A friend then "rung the [Kellys'] doorbell and [Amber] went over and checked on the kid". Kelly answered the door; but Amber did not hear any conversation between him and her friend. *Id.* at 171a-74a.

Neither of the Beachers testified that, on any prior occasion, any children were "*left unattended* in * * * *locked* vehicles" or were "*endangered* by [*Kelly's*] actions", or that there was any "*danger* arising from *his* conduct" (or anyone else's), as the Commonwealth had misrepresented. Moreover, the Beachers said nothing as to:

•which children were in the van, or in two instances how old the children were;

•when, by whom, and why the children were placed in the van – or whether Kelly's conduct caused the situation;

•whether the children were "left" in the van at all, in the relevant sense of "DESERT, ABANDON";[5]

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[5] *See Webster's Third New International Dictionary* (1971), at 1287. Erin Beacher testified that "I told [Kelly] he left a child inside the car"; and Amber Beacher "saw a kid left in the car". *Id.* at 164a, 168a; 172a. But neither testified that any child had been "left" in the sense indicated in the text, that Kelly had "left" the child, or that no one in his household was aware the child was there.

•for how long the children were alone in the van;

•whether conditions in the van threatened the children;

•whether the children were crying because of physical distress or for some benign reason;

•whether someone in the Kellys' home was monitoring the children (*e.g.*, frequently looking out a window);

•whether someone would have attended to the children had the Beachers done nothing;

•whether Kelly acknowledged that the children's presence in the van resulted from accident or negligence;

•whether anyone warned Kelly the children were in danger; or

•whether any of Kelly's older children was not, then or later, a prudent individual to whom he could entrust the routine care of his younger children.

3. At the close of the Commonwealth's case, Kelly moved to strike under Virginia Rule 3A:15(a), based on insufficient evidence; but the Circuit Court denied his motion. He then rested his case, and moved to strike again, on the same grounds; but the court denied this motion, too. App at 27a-34a. The jury convicted him on both charges. He then moved to set aside the verdicts and have judgments of acquittal entered under Virginia Rule 3A:15(b, c), on the grounds of insufficiency of the evidence and related Federal and State constitutional violations; but the Circuit Court denied this motion as well. App at 35a-70a.

4. The Court of Appeals affirmed. Under color of Virginia Rule 5A:18, it refused to address Kelly's constitutional questions, because he had "raised no constitutional arguments in his motion to strike". App at 4a-5a. The court said nothing about his motion to set aside, which did raise those issues; and did not mention that under Virginia law a motion to strike is not a prerequisite for a motion to set aside. The court also attempted to protect from attack the Beachers' testimony on the ground that "Kelly did not challenge [the '[r]elevancy' of] the[ir] testimony * * * either at the time they testified or in his motion to strike", and "[t]herefore, Rule 5A:18 bars our consideration of this question". *Id.* at 5a. In fact, Kelly challenged the sufficiency of the testimony in his motions to strike and to set aside, and its sufficiency and constitutionality in the latter motion. *Id.* at 30a, 43a-46a, 55a-60a, 69a. The court failed to acknowledge that the only evidence of Kelly's knowledge, state of mind, and conduct during the material period between 12:50 and 4:00 pm (his written statement) unquestionably exculpated him. The court argued that Kelly's "failure to inquire after Frances from the time he left her in the van to her discovery by the McIvors bespeak his total and utter disregard for her well-being, safety, and life". *Id.* at 8a-9a. But it neither questioned the reasonableness of his assumption between 1:10 and 2:40 pm that Frances was taking her nap, nor explained how his behavior after 4:00 pm could constitute a cause of her death which occurred between 2:20 and 3:10 pm. The court falsely claimed that "[t]he Beacher[s] * * * had informed Kelly on at least three previous occasions that one of his children was locked in a vehicle". *Id.* at 8a. In fact, no such testimony was given. Relying on its contention concerning "[r]elevancy", the court refused to address Kelly's proofs that the Beachers' testimony was

insufficient under Virginia law; and that, if Virginia law allowed its use for imputing "notice" to him, the law denied due process. Finally, unable to identify anything that "show[ed] that a homicide was not improbable under all of the facts existing [between 12:00 noon and 2:40 pm], and that the knowledge of such facts should have had an influence on [Kelly's] conduct", as Virginia's common law of criminal negligence requires, the court upheld the convictions on an unprecedented theory of strict liability. *Contrast id.* at 8a *with id.* at 23a-25a, *and post*, at 12-14.

5. Notwithstanding Kelly's exposure of these demerits, the court denied rehearing *en banc*. App at 83a-88a, 21a. And notwithstanding both his reassertion of his original constitutional contentions, and his attack on the new theory of strict liability as an additional denial of due process, the Supreme Court of Virginia denied an appeal. *Id.* at 89a-95a, 20a.

REASONS FOR ALLOWANCE OF THE WRIT

"It is important that crime be punished. It is even more important that the one punished should first be proved guilty by the evidence." *Smith* v. *Commonwealth*, 185 Va. 800, 819, 40 S.E.2d 273, 282 (1946). *See* In re *Winship*, 397 U.S. 358, 364-65 (1970). More important yet is that crimes should never be reinvented on appeal to fit the evidence, in order to punish. *Bouie* v. *City of Columbia*, 378 U.S. 347, 350, 352-55 (1964); *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Such kangaroo jurisprudence guts the credibility and legitimacy of every court that engages in, or refuses to rectify, it.

Kelly's guilt was not "established by probative evidence and beyond a reasonable doubt", as due process requires. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976). The *only* evidence as to the critical period from 12:00 noon to 2:40 pm on the fatal day is his statement – which exculpates him under Virginia's law of criminal negligence. *See post*, at 17-19. And the evidence regarding both his conduct after 4:00 pm on that day, and the prior events, is insufficient as a matter of Virginia law and due process. *See post*, at 19-27. Therefore, his convictions denied him due process. *E.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 309, 315-16 (1979).

Knowing this, the Court of Appeals concocted an unprecedented theory of strict liability in order colorably to affirm those convictions – superadding another denial of due process. *E.g.*, *Bouie* v. *City of Columbia*, 378 U.S. 347, 350, 352-55 (1964). *See post*, at 12-14. Moreover, conscious that its handiwork could not survive scrutiny, it invented specious "independent state grounds" to explain away its avoidance of Kelly's original due-process claims, and to wall off those claims from review in this Court. *See*, *e.g.*, *Bouie*, 378 U.S. at 354. *See post*, at 14-16.[6]

These maneuvers constitute damning admissions that the Court of Appeals intentionally violated Kelly's Federal constitutional rights – because, were the evidence sufficient as a matter of traditional Virginia law, his due-process claims consequentially would fail (and therefore could be decided perfunctorily), and no invocation of the

[6] The Court of Appeals did not realize that these fictional excuses could not apply to its denial of due process through its use of strict liability, as that was an "action[] taken by[] the Court of Appeals" itself. Virginia Rule 5:17(c), *in* App at 26a.

deus ex machina of strict liability would be called for. Such chicanery – calculated to cut off the core protection of due process in criminal prosecutions – compels review, reversal, and indeed rebuke in this Court: to vindicate Kelly's rights; to defend the integrity of America's judicial system; and to deter escapades of this ilk in other cases.

I. A. The Court of Appeals affirmed Kelly's convictions using strict liability because, faced with the evidence and Virginia's law of criminal negligence, it could find no other colorable way to deny him relief. For uncontradictable is that, during the critical period from 12:50 through 2:40 pm on the day in question, he "instructed [his] older kids to get everyone in the house", then "assumed Frances was taking her nap". App at 103a-04a. *No* evidence impugned this as unreasonable under the circumstances. When he departed at 2:40 pm, still assuming Frances was asleep, he "le[ft his teenaged] kids in charge". *Id.* at 104a. *No* evidence impugned this as unreasonable, either. *Nothing* "show[ed] that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on [his] conduct", as Virginia's law requires. *Bell* v. *Commonwealth*, 170 Va. 597, 611, 195 S.E. 675, 681 (1938). *See* App at 23a-25a.

Notwithstanding every relevant Virginia precedent, however, the Court of Appeals affirmed on the grounds that "Kelly was *solely responsible* for Frances"; "Kelly, through his dereliction, left Frances in the vehicle * * * *without ensuring that his instructions were obeyed*"; "he made no *further* provisions for or inquiry about Frances"; and "Kelly *assumed but never ascertained* that Frances was asleep in the house". *Id.* at 8a (emphasis supplied). Under this theory, Kelly could not have reasonably

delegated care of Frances to his teenagers without criminal liability if she suffered even purely accidental injury while in their custody. For if she *were* injured (as she was), prosecutors could *always* say (as they did), *and irrebuttably so* (as the Court of Appeals held), that Kelly did not "ensur[e]", make sufficient "further provisions for or inquiry about", or "ascertain[]" her safety – and was wrong to "assume[]" that his teenagers would provide the necessary care. Otherwise, the accident would not have occurred, by hypothesis. So, *Kelly's reasonable delegation of care, unforeseen harm resulting to Frances, the Court of Appeals treated as criminally negligent with no possible defense* – that is, *a strict-liability offense.*

Yet nothing in Virginia law makes it violative of any duty, let alone criminally negligent, for a parent reasonably to delegate to another responsible individual the routine care of a child without "ensuring", "ascertain[ing]", and making "further provisions * * * or inquiry" that the care has been provided, but instead reasonably assuming that it has. Not only can no such duty be found in *Bell* or any other precedent, but also the absence of such a duty informs *Ellis* v. *Commonwealth*, which held that a parent's "inattention and inadvertence" and failure "satisfactorily [to] monitor her children" did *not* constitute criminal negligence, even though she knowingly left them unattended and herself negligently started a fire that endangered them – neither of which aggravating circumstances obtained in this case. 29 Va. App. 548, 554-57, 513 S.E.2d 453, 456-58 (1999). And Virginia's Supreme Court has denied that criminal negligence is a strict-liability crime. *See Cable* v. *Commonwealth*, 243 Va. 236, 240-42, 415 S.E.2d 218, 220-21 (1992); *Gooden* v. *Commonwealth*, 226 Va. 565, 571-73, 311 S.E.2d 780, 784-85 (1984). Thus, the

Court of Appeals' vendetta against Kelly exhibits situation jurisprudence at its worst.

So desperate was that court to affirm his convictions that *it rendered all family life in Virginia an inherently criminal undertaking*, because reasonable delegations by parents of normal care of their small children to third parties – be they older children in the family, older children from other families (*e.g.*, baby-sitters), other adults in the family (*e.g.*, grandparents), or adult friends – are unavoidable; and accidental harms to children in anyone's care can never be eliminated.

B. Because the Court of Appeals affirmed Kelly's convictions by misconstruing, in an unexpected and indefensible manner, Virginia's law of criminal negligence so as to punish him for conduct that was not criminal when he engaged in it, that court's judgment denied him due process, and must be reversed. *Bouie* v. *City of Columbia*, 378 U.S. 347, 350, 352-55 (1964); *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973); *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

II. The inadequacy of the Court of Appeals' "independent state grounds" for avoiding Kelly's claim that his convictions denied him due process under Virginia's traditional standards for criminal negligence is itself a Federal question that this Court reviews *de novo*. *Howlett* v. *Rose*, 496 U.S. 356, 366 (1990).

A. The Court of Appeals' excuse that "Kelly raised no constitutional claims in his motion to strike", and therefore Virginia Rule 5A:18 bars review, is specious, because those claims *were* raised in his motion to set aside, and thus *were* "presented to the trial court". *Contrast* App at 4a-5a *with id.* at 35a-46a, 50a, 59a-60a,

77a-78a. Inasmuch as Kelly could not have been denied due process by being convicted without proof beyond a reasonable doubt until the jury actually found him guilty, whereupon his remedy under Virginia procedure was a Rule 3A:15(b) motion to set aside the verdicts, not a Rule 3A:15(a) motion to strike the evidence, the Court of Appeals' contention that the latter was the only way to raise that issue deserves no credence. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 365-67 (1886). Virginia law is clear that "[c]ounsel may meet the mandates of Rule 5A:18 in many ways. * * * [C]ounsel may make clear the ground for his objection in a motion to strike * * * [but] may also state the grounds therefor during a motion to set aside". *Lee* v. *Lee*, 12 Va. App. 512, 515, 404 S.E.2d 736, 738 (1991). *Accord, Akers* v. *Commonwealth*, 31 Va. App. 521, 527, 525 S.E.2d 13, 16 (2000); *Brown* v. *Commonwealth*, 8 Va. App. 474, 480, 382 S.E.2d 296, 300 (1989). In addition, "[a] prior motion to strike * * * is not a prerequisite to a motion to set aside". *McGee* v. *Commonwealth*, 4 Va. App. 317, 321, 357 S.E.2d 738, 739-40 (1987). *Accord, Brown*, 8 Va. App. at 480, 382 S.E.2d at 300.

B. Equally spurious is the Court of Appeals' excuse that "Kelly did not challenge the ['[r]elevancy' of the] testimony of the Beacher sisters either at the time they testified or in his motion to strike". App at 5a. His motions to strike argued that their testimony was nonprobative and insufficient; and his motion to set aside attacked the testimony's probative value, sufficiency, and constitutionality. *Id.* at 30a, 43a-46a, 55a-60a, 69a, 77a-81a. That these grounds cannot be raised in a motion to strike or to set aside without a prior objection to "[r]elevancy" is nonsensical, because such motions typically accept evidence *as* relevant, challenging it as insufficient. Moreover,

as explained above, a motion to set aside satisfies Rule 5A:18, and requires no preliminary motion to strike to be effective.

C. Thus, the Court of Appeals' procedural inventions emerge as transparently indefensible dodges interposed to deprive Kelly of a hearing on his Federal due-process claims: *à la carte* jurisprudence at its most palpable. But "[n]ovelty in [State] procedural requirements cannot be permitted to thwart review in this Court", particularly when the new rules are "'without any fair or substantial support'" in legal rationality as well as State law. *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449, 457, 455 (1958). So, because the Court of Appeals' imaginary procedural requirements have never been "firmly established and regularly followed" in Virginia, they cannot cut off Kelly's right to review now. *Ford* v. *Georgia*, 498 U.S. 411, 423-24 (1991); *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988); *Ulster County Court* v. *Allen*, 442 U.S. 140, 147-51 (1979). Rather, they emphasize why this Court must grant his Petition.

III. On the merits of his due-process challenges to his convictions – *if some court will ever honestly address them* – Kelly must prevail. The Commonwealth's evidence is tripartite: (A) From 12:00 noon to 4:00 pm on the day in question – which disproved the charges. (B) From 4:00 to 7:30 pm on that day – which was wholly nonprobative. And (C) the prior events – the "substantial similarity" of which to the incident in issue the Beachers' testimony failed to prove, contrary to Virginia law; and the use of which violates due process. This Court may independently examine this evidence to determine that Virginia's legal standards and due process were not met. *Napue* v. *Illinois*, 360 U.S. 264, 271-72 (1959).

A. Because Frances died between 2:20 and 3:10 pm, this case turns on what happened between 12:50 pm, when Kelly first returned home and "instructed [his] older kids to get everyone in the house", and 2:40 pm, when he departed the house, "leaving [his teenaged] kids in charge", not to return again until 4:00 pm.

1. Although the Court of Appeals cited *Bell's* standard for criminal negligence, nowhere did it demonstrate that the incident *sub judice* was "something more than mere inadvertence or misadventure"; that "a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on [Kelly's] conduct"; or that his behavior "show[ed] a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which ma[d]e it not improbable that injury [would] be occasioned, and [he knew], or [was] charged with the knowledge of, the probable result of his acts". *Contrast* App at 6a-9a *with Bell*, 170 Va. at 611-12, 195 S.E. at 681. This dearth of proof is dispositive: for, in Virginia, criminal negligence "is imputed because of the recklessness, and *where there is no recklessness there is no crime.*" *Goodman* v. *Commonwealth*, 153 Va. 943, 952, 151 S.E. 168, 171 (1930) (emphasis supplied). Moreover, "[t]he mere happening of an accident does not give rise to an inference of reckless[ness]". *Powers* v. *Commonwealth*, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970). *Accord*, *Bacon* v. *Commonwealth*, 220 Va. 766, 769, 263 S.E.2d 390, 392 (1980).

2. The *only* evidence as to Kelly's conduct, his knowledge, his state of mind, and the basis for his behavior from 12:00 noon to 4:00 pm is his statement: *the Commonwealth's own* exhibit. App at 103a-05a. This is

direct evidence – *undisputed at trial and indisputable on appeal*. In Virginia, "[w]hen a defendant is called as an adverse witness * * * the plaintiff is bound by so much of the testimony * * * as is clear, reasonable and uncontradicted." *Beale* v. *Jones*, 210 Va. 519, 521, 171 S.E.2d 851, 853 (1970). And "'[t]he trier of fact * * * "may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record." A [jury] may not base its findings on a suspicion which is contrary to the undisputed positive testimony.'" *Forbes* v. *Commonwealth*, 27 Va. App. 304, 312, 498 S.E.2d 457, 460 (1998). Moreover, "[i]f we reject [Kelly's] statement, we are left without any explanation of how the accident occurred and can only speculate or guess". *Bacon* v. *Commonwealth*, 220 Va. 766, 768-69, 263 S.E.2d 390, 391 (1980). But speculation cannot satisfy the due-process standard "'of reaching a subjective state of certitude of the facts in issue'". In re *Winship*, 397 U.S. 358, 364 (1970).

According to his statement, when Kelly first returned home at 12:50 pm he "instructed [his] older kids to get everyone in the house". When he returned again at 1:10 pm, he "assumed Frances was taking her nap which was normal for early afternoon". His assumption was objectively reasonable, and supported by the Commonwealth's own expert witness. *See* App at 176a (Dr. Foster). When he departed at 2:40 pm, he "le[ft his teenaged] kids in charge". This conduct cannot be impugned even as the "inattention and inadvertence" held *not* "subject to criminal penalty" in *Ellis*. 29 Va. App. at 554-57, 513 S.E.2d at 456-58. For Ellis knew that her children were unattended; whereas Kelly believed that, pursuant to his instruction, Frances was inside, sleeping. Furthermore, *Bell* requires

that Kelly knew, or could be charged with knowledge, that "a homicide was not improbable under all of the facts existing at the time". 170 Va. at 611, 195 S.E. at 681. *His statement – which the Commonwealth introduced – proves he knew no such thing. At the very least, it establishes a reasonable doubt as to his knowledge of danger – irrefutable because of the absence of any contrary evidence.* A reasonable doubt is one "'"based on reason which arises from the evidence or lack of evidence."'" *Johnson* v. *Louisiana*, 406 U.S. 356, 360 (1972). Kelly "is entitled to the benefit of a reasonable doubt arising from the evidence of the Commonwealth". *Sims* v. *Commonwealth*, 134 Va. 736, 753, 115 S.E. 382, 388 (1922). And "if there be a reasonable doubt as to any fact, the [jury] shall acquit". *Burton* v. *Commonwealth*, 108 Va. 892, 898, 62 S.E. 376, 379 (1908), *cited in Corbett* v. *Commonwealth*, 210 Va. 304, 306-07, 171 S.E.2d 251, 253 (1969).

B. The Court of Appeals said that

> Frances could have survived only one and a half or two hours * * * . Kelly argues that only his omissions in that time frame are relevant * * * . We disagree. His failure to inquire after Frances from the time he left her in the van to her discovery by the McIvors bespeak his total and utter disregard for her well-being, safety, and life.

App at 9a. A naked "[w]e disagree", however, cannot erase *why* Kelly did not inquire about Frances from his return home at 1:10 until he left at 2:40 pm – namely, his reasonable assumption that she was napping. That assumption cannot evidence "his total and utter disregard for her well-being, safety, and life", because he reasonably believed he knew where she was. By the time he returned at 4:00 pm,

having in his absence "le[ft his teenaged] kids in charge", Frances had died. But by then he could have done nothing.

Even if Kelly's behavior *from 4:00 pm onwards* exceeded the "inattention and inadvertence" in "monitor[ing]" a child that *Ellis* held not "subject to criminal penalty" (29 Va. App. at 554-57, 513 S.E.2d at 456-58), *it cannot evidence recklessness as to a death that occurred before 4:00 pm without reversing cause and effect.* To find criminal negligence in Virginia, "[i]t must be shown that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender." *Bell*, 170 Va. at 611, 195 S.E. at 681. Criminal negligence "is * * * acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Griffin* v. *Shively*, 227 Va. 317, 321, 315 S.E.2d 210, 213 (1984). "[F]acts *existing at the time*" and "knowledge of *existing* circumstances" refer to the period *preceding* "a homicide", because "reckless indifference to the consequences" must occur before or coincide with the harmful results of the accused's behavior. "To impose liability upon one person for damages incurred by another, it must be shown that the negligent conduct was a necessary physical antecedent to the damages." *Beale* v. *Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970). "The failure to perform a duty establishes the proximate cause of an injury only where the doing of the omitted act would have prevented the injury." *Dugroo* v. *Garrett*, 203 Va. 918, 920, 128 S.E.2d 303, 305 (1962). "[R]eckless disregard for human life must be causally linked to the homicide to establish involuntary manslaughter. * * * '[R]ecklessness' is separate and distinct

from 'proximate cause.'" *Jetton* v. *Commonwealth*, 2 Va. App. 557, 561, 347 S.E.2d 141, 144 (1986).

Because Frances died no later than 3:10 pm, to infer Kelly's guilt from his conduct after 4:00 pm is impermissible as a matter of Virginia law. Virginia's Supreme Court defines proximate cause as "'that act or omission which, in natural and continuous sequence, * * * produces the event, *and without which that event would not have occurred.*'" So,

> any negligence on [Kelly's] part occurring after [4:00 pm] was completely disconnected from [Frances's] death. It could not have been an "act or omission which . . . produce[d] the event." Neither could it be said that without it "that event would not have occurred." Indeed, * * * [Frances's death] would have occurred despite the greatest imaginable diligence [Kelly] might have exercised upon [his] premises after [he returned at 4:00 pm] * * * .
>
> Although the issue of proximate cause is generally a matter for determination by a jury, the jury cannot infer it from a vacuum.

Commercial Distributors, Inc. v. *Blankenship*, 240 Va. 382, 395, 397 S.E.2d 840, 847 (1990).

Moreover, to infer Kelly's guilt from his conduct after 4:00 pm is irrational, arbitrary, and unconstitutional, inasmuch as the conclusion *logically cannot* follow from the predicate facts. *See Leary* v. *United States*, 395 U.S. 6, 36 (1969).

Therefore, although the Court of Appeals' fantasy that cause and effect can be reversed in order to affirm Kelly's criminal convictions might be acceptable in an episode of

Star Trek, it cannot supply a real-world "standard[] of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment", and for that reason requires reversal. *See Addington* v. *Texas*, 441 U.S. 418, 423 (1979) (footnote omitted). Indeed, because "[a] 'reasonable doubt,' at a minimum, is one based upon 'reason'", inasmuch as that court's theory of culpability is supremely unreasonable it compels Kelly's acquittal. *See Jackson* v. *Virginia*, 443 U.S. 307, 317 (1979) (footnote omitted).

C. 1. According to the Court of Appeals,

> [t]he Beacher sisters explained that they had informed Kelly on at least three previous occasions that one of his children was locked in a vehicle. Thus, Kelly was on notice of this hazard. Nevertheless, Kelly failed to oversee Frances and, in complete dereliction of his duty to her, he failed to investigate her whereabouts or well-being for an unreasonably long period of time.

App at 8a-9a. This is counterfactual. The Beachers said *nothing* about "children * * * *locked* in a vehicle", or about "th[e] hazard" *that actually arose* on the day *sub judice*, or about *any specific* "hazard". The material period in which Kelly did not "investigate [Frances's] whereabouts" was not "unreasonably long", but only from about 1:10 to 2:40 pm, *while he reasonably assumed she was napping*. Moreover, that he was *honestly and reasonably mistaken* as to "her whereabouts or well-being" cannot be a "dereliction of his duty", unless he is strictly liable for any harm that befell Frances.

2. a. The Court of Appeals did not even claim that the Beachers described events *substantially similar* to the incident *sub judice*. In Virginia, "evidence of prior negligent

habit is inadmissible to prove the acts of negligence alleged at trial". *Ligon* v. *Southside Cardiology Associates*, 258 Va. 306, 312, 519 S.E.2d 361, 364 (1999). Evidence of a prior accident may, however, be probative of the defendant's "notice" of a still-existing dangerous condition – but *only* if there is

> *substantial similarity*. If the place, the circumstances, and the defect associated with a prior accident are substantially the same as those in issue, evidence of that accident is admissible to show notice * * * of the defect and * * * its dangerous potential.

Roll 'R' Way Rinks, Inc. v. *Smith*, 218 Va. 321, 325-26, 237 S.E.2d 157, 160 (1977). The evidence must "show[] that those prior accidents * * * happened at substantially the same place and under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue, or by the acts of the same person". *Spurlin* v. *Richardson*, 203 Va. 984, 989, 128 S.E.2d 273, 277 (1962), *followed in Owens-Corning Fiberglas Corp.* v. *Watson*, 243 Va. 128, 137, 413 S.E.2d 630, 635-36 (1992). Similarly, where "there [is] no causal relation or logical connection between [a prior] offense and the crime charged, nor did the two crimes form parts of one transaction", "evidence of the [prior] crime [is] not probative * * * of the defendant's intent in the crime charged". *Guill* v. *Commonwealth*, 255 Va. 134, 140, 495 S.E.2d 489, 492-93 (1998). A prior offense must be "'sufficiently idiosyncratic in relation to th[e] offense [charged] to permit an inference of a pattern'". Otherwise, it "lack[s] a logical relationship to the offense charged" and "ha[s] no probative value". *Guill*, 255 Va. at 141, 495 S.E.2d at 493.

b. No evidence exists that any negligence with "substantial similarity" to, or any offense "sufficiently idiosyncratic in relation to", any alleged wrongdoing that caused Frances's death had occurred previously, so as to put Kelly on "notice of the existence of the defect and * * * its dangerous potential", or to establish a "causal relation or logical connection" between a prior incident, his conduct on the day in question, and her death. *Roll 'R' Way Rinks*, 218 Va. at 325-26, 237 S.E.2d at 160; *Guill*, 255 Va. at 140-41, 495 S.E.2d at 492-93.

First, "substantial similarity" cannot even be argued, because "[t]oo many essentials in the chain of circumstances [were] lacking". *Whitlow* v. *Commonwealth*, 198 Va. 165, 168, 93 S.E.2d 127, 129 (1956). *See ante*, at 6-8. Certainly nothing suggests that, on any prior occasion, *Kelly* had instructed one of his older children to remove a younger child from a vehicle, but the older child had left the younger one in a car seat in the closed-up vehicle under dangerous circumstances; *and Kelly*, through his own neglect, had been unaware of the younger child's plight until the Beachers had brought it to his attention; *and* the older child had been the *selfsame child* (or one of the children) whom Kelly instructed to remove Frances from the van on the fatal day. *See Smarr* v. *Commonwealth*, 219 Va. 168, 170, 246 S.E.2d 892, 893 (1978).

Second, no one can infer "notice" from the Beachers' testimony beyond a reasonable doubt. "Substantial similarity" being far less likely an inference than its opposite from their testimony, to draw the former conclusion is impermissible, as a matter of both Virginia law and Federal due process. *See Morton* v. *Commonwealth*, 13 Va. App. 6, 10-11, 408 S.E.2d 583, 584-86 (1991); *Leary* v. *United States*, 395 U.S. 6, 36 (1969). Thus, the further

inference of "notice" "would have been purely speculative because no facts were proved that would have supported [it]". *Hill* v. *Commonwealth*, 17 Va. App. 480, 485, 438 S.E.2d 296, 299 (1993). "[F]or inferences to amount to evidence they must be inferences based on facts that are proved, and not inferences based on other inferences." *Smith* v. *Commonwealth*, 185 Va. 800, 819, 40 S.E.2d 273, 282 (1946).

Third, the factual lacunae in the Beachers' testimony "point to a failure of the Commonwealth to exclude the reasonable hypothesis" of innocence. *Reynolds* v. *Commonwealth*, 9 Va. App. 430, 440-41, 388 S.E.2d 659, 665-66 (1990). For example, the record supports the explanation that, on the prior occasions, having returned home Mary Kelly had parked the van – which she, not Kevin Kelly, normally used. App at 103a, 169a. A child was asleep in a car seat. Rather than spoil the child's rest, Mary allowed the child to remain in the van, its windows or doors open – as many parents do. *See id.* at 123a-24a. This was safe, as the temperature was not oppressive. From within the house she monitored the van, intending to go out when the child awakened. Ignorant of this, Erin or Amber Beacher arrived shortly after the child began to cry – not from physical discomfort, but from being alone and restrained. When Erin Beacher spoke to Kelly, he said "Thank you" and brought the child inside, not to acknowledge that the child had been "left" in the van, but to conclude a conversation with a neighbor who misinterpreted what she saw. So, because no one can "say that the evidence here excludes every reasonable hypothesis of innocence and is consistent only with [Kelly's] guilt", "the evidence is insufficient to support the conviction[s]". *Powers* v. *Commonwealth*, 211 Va. 386, 389, 177 S.E.2d 628, 630 (1970).

Due process cannot be satisfied by "a grave uncertainty" or "an actual substantial doubt" as to what happened. *See Cage* v. *Louisiana*, 498 U.S. 39, 40-41 (1990).

Fourth, even if Kelly's encounters with the Beachers put him on notice that Mary allowed children to sleep in the van, on the day in question Mary was in Ireland; and Kelly instructed his older children, not Mary, to bring Frances inside. Similarly, even if on prior occasions Kelly himself had allowed children to remain *in* the van, on the day in question he instructed his older children to take the younger ones *out*. Supposed notice to Kelly as to Mary's or his own habit (if such it was) proves nothing as to the older children, who were given *different* instructions. And it exculpates Kelly, because he took care not to leave Frances in the van, by instructing his teenaged children to bring her inside.

3. Finally, to infer Kelly's criminal negligence on the day *sub judice* from prior instances of *imagined* wrongdoing by particular persons *unknown*, under circumstances in material particulars *undescribed*, is irrational, arbitrary, and unconstitutional. *First*, the inference improperly expands criminal laws by *ex post facto* construction. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 353-54 (1964). *Second*, it cannot be said with substantial assurance that the inferences (prior events leading to "substantial similarity", leading to "notice") more likely than not flow from what little the Beachers saw. *See Leary* v. *United States*, 395 U.S. 6, 36 (1969). *Third*, because those inferences are wholly speculative, they prop up the convictions with insufficient evidence. *See Jackson* v. *Virginia*, 443 U.S. 307, 309, 314-18 (1979). *Fourth*, the Commonwealth's theory of "notice" renders the charges void for vagueness as applied, even though it operates through construction of

the crimes or interpolation of a rule of evidence. *Compare, e.g., Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 73 (1911) (State court's construction is part of the statute), *with* Ex parte *Virginia*, 100 U.S. 339, 346-47 (1880) (Fourteenth Amendment applies to State's judiciary), *Mooney* v. *Holohan*, 294 U.S. 103, 112-13 (1935) (Fourteenth Amendment applies to State's "prosecuting officers"), *and Chambers* v. *Mississippi*, 410 U.S. 284, 294-303 (1973) (State's evidentiary rules deny due process). For, by criminalizing conduct in the present with speculations about conduct from the past, the theory illicitly licenses prosecutors, judges, and jurors arbitrarily and erratically to convict defendants on the basis of guesses and imaginings. *E.g., Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983). Before the theory was broached to him in the Circuit Court, Kelly could not have known that, by instructing his older children to take Frances out of the van while he attended to other matters, he would commit criminal negligence if some accident supervened, because, years earlier, the Beachers had seen other children in the van, but knew nothing about the circumstances. *See Rabe* v. *Washington*, 405 U.S. 313, 314-16 (1972); *Pierce* v. *United States*, 314 U.S. 306, 311 (1941).

D. Because the evidence cannot support guilt beyond a reasonable doubt, the verdicts are arbitrary and irrational and deny Kelly due process. *See Jackson* v. *Virginia*, 443 U.S. 307, 309, 314-18 (1979); *Thompson* v. *City of Louisville*, 362 U.S. 199, 204-06 (1960); and authorities cited *ante*. Moreover, not only must the verdicts be set aside, but also judgments of acquittal must be entered. *Burks* v. *United States*, 437 U.S. 1, 11, 16-18 (1978); *Greene* v. *Massey*, 437 U.S. 19, 24 (1978).

CONCLUSION

Truly culpable in this case is not Kevin Kelly, but the Court of Appeals – which could affirm his convictions only by disregarding dispositive exculpatory evidence, seizing on spurious evidence that either reverses cause and effect or lacks "substantial similarity" to the incident at issue, and imposing an unprecedented standard of strict liability. This Court's duty is to correct that injustice. This Petition should be granted.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 20112
(703) 791-6780
Counsel of Record
for Kevin C. Kelly

APPENDIX A

COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick, Judge Annunziata and Senior Judge Willis Argued at Alexandria, Virginia

KEVIN CHRISTOPHER KELLY

v. Record No. 0762-03-4

COMMONWEALTH OF VIRGINIA

OPINION BY JUDGE JERE M. N. WILLIS, JR.
FEBRUARY 3, 2004

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

Rossie D. Alston, Jr., Judge

Edwin Vieira, Jr., for appellant.

Robert H. Anderson, III, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

Kevin Christopher Kelly was convicted in a jury trial of involuntary manslaughter and felony child neglect in connection with the death of his twenty-one-month-old daughter, Frances. On appeal, he contends that the evidence is insufficient to support his convictions. We affirm the judgment of the trial court.

BACKGROUND

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom.'" *Archer v. Commonwealth,* 26 Va. App. 1, 11, 492 S.E.2d 826, 831 (1997) (citation omitted).

On May 29, 2002, at approximately 7:00 p.m., neighbors found Frances strapped in a car seat inside a locked van parked outside Kelly's house. The windows were closed. That day had been very hot. Emergency workers who arrived at the scene determined Frances had died. Two hours later, her body temperature was 105.7 degrees. The medical examiner testified Frances died from hyperthermia caused by her being left inside the hot vehicle.

[2] Kelly told investigating police officers that his wife and eldest daughter were visiting family in Ireland, leaving him in charge of the family's twelve other children. He gave the police a written statement detailing his actions on that day. His statement reveals that although he was in and out of the home throughout the day, he had not checked on Frances' welfare for a period of at least seven hours.

Around noon, Kelly took Frances and his other "pre-school children," "to pick up the high school/junior high kids from" school. One of the children needed to stay late at school. He returned home with the others. He told one officer that he instructed his "older kids" to get everyone in the house. He told another officer that he told Anthony, his sixteen-year-old son, "to take the children inside." He did not see that this was done. Leaving the van parked in the street, he left in another vehicle to pick up the child from school.

Kelly returned to the house at 1:00 p.m. He left again at 2:30 p.m. to pick up his "grade school kids." He returned home at approximately 4:00 p.m., at which time he spoke with Michael Byrne, a heating and air conditioning mechanic working at a neighboring house. Kelly told the police that during this time, he assumed Frances was taking a nap, that she normally took a nap in the early afternoon.

Byrne testified that over the next two to three hours, he saw Kelly "in and out of the house several different times." During this time, Kelly and Anthony worked on a fence. The van remained parked on the street. Between 5:00 p.m. and 6:00 p.m. Byrne saw Kelly enter his other vehicle and shortly thereafter noticed the vehicle was no longer in the driveway. Byrne testified that Kelly would "either [have driven] by [the van] or he could have backed up next to it when he backed out" of the driveway in the other vehicle.

At approximately 7:00 p.m., Joan and Brian McIvor discovered Frances in the van. Brian McIvor went to the house and told Anthony that there was a child in the van. Anthony "looked [3] very panicked" and ran to the van. He retrieved the keys to the vehicle and opened the door. Joan McIvor screamed for help, and Byrne called 911 from his cellular telephone. Byrne unsuccessfully attempted to resuscitate the child. He noticed she was very hot to the touch and that her skin was peeling. The rescue squad arrived and determined Frances had died. One of Kelly's sons called him, and he returned home shortly after the paramedics arrived.

Dr. Robin Foster testified as an expert in pediatrics, pediatric emergency medicine, and child abuse and neglect. He explained that a twenty-one-month-old child, "because of [her] mobility, require[s] constant supervision." He testified that during a seven-hour waking period, such a child would need two meals and at least twelve ounces of fluid. He further explained that during a seven-hour period, such a child would also require several diaper changes and a daytime nap. Because of the heat on May 29, 2002, a twenty-one-month-old child would have required additional fluid to remain hydrated.

Erin and Amber Beacher lived across the street from Kelly and his family. They testified, without objection, about prior incidents involving Kelly's children. Both girls had seen children locked inside a car or the van in front of Kelly's residence on hot or warm days. Erin explained that on two occasions, approximately three and four years prior to the current incident, she alerted Kelly that a child had been left in a vehicle. Both times "a slight crying from the van" had attracted her attention. Amber reported a similar incident, two or three years earlier, in which she and a friend found a crying two to three-year-old child locked in the van on a warm summer day. Amber's companion knocked on the Kellys' door and spoke to Kelly.

[4] ANALYSIS

I.

In his sufficiency challenge, Kelly also argues that "the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and of the United States," that the testimony of the Beacher sisters was irrelevant, and that the evidence failed to exclude reasonable hypotheses of innocence. We need not address these issues.

Constitutional Arguments

This Court will not consider an argument on appeal that was not presented to the trial court. *Ohree v. Commonwealth,* 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998); Rule 5A:18. The requirements of Rule 5A:18 apply equally to constitutional claims. *Deal v. Commonwealth,* 15 Va. App. 157, 161, 421 S.E.2d 897, 900 (1992). Kelly raised no constitutional arguments in his motion to strike the evidence. Accordingly, Rule 5A:18 bars our consideration

of this question on appeal. The record reflects no reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

Relevancy Argument

Rule 5A:18 requires that objections to a trial court's action or ruling be made with specificity in order to preserve an issue for appeal. *Campbell v. Commonwealth,* 12 Va. App. 476, 480, 405 S.E.2d 1, 2 (1991) (*en banc*). A trial court must be alerted to the precise "issue" to which a party objects. *Neal v. Commonwealth,* 15 Va. App. 416, 422-23, 425 S.E.2d 521, 525 (1992). Kelly did not challenge the testimony of the Beacher sisters either at the time they testified or in his motion to strike the evidence. Therefore, Rule 5A:18 bars our consideration of this question on appeal.

[5] Hypotheses of Innocence Argument

Kelly contends that his convictions must be reversed because the Commonwealth failed to exclude all reasonable hypotheses of his innocence. This principle applies only when the Commonwealth attempts to prove its case through circumstantial evidence. *See, e.g., Burrows v. Commonwealth,* 224 Va. 317, 319, 295 S.E.2d 893, 894 (1982) (evidence insufficient to prove accused was criminal agent in robbery and malicious wounding because victim could not affirmatively identify his assailant and circumstantial evidence did not exclude all reasonable hypotheses of appellant's innocence). When the Commonwealth offers direct evidence from eyewitnesses whose testimony is not inherently incredible, the jury may accept that testimony as credible and reject all conflicting evidence,

thereby determining, in essence, that no reasonable hypotheses of innocence remain.

II.

Kelly contends that the Commonwealth failed to demonstrate that he acted with "criminal negligence" and, therefore, failed to prove the elements of the involuntary manslaughter and child neglect charges.

The Charges

Involuntary manslaughter is defined "as the accidental killing of a person, contrary to the intention of the parties, during the prosecution of an unlawful, but not felonious, act, or during the improper performance of some lawful act." *Gooden v. Commonwealth,* 226 Va. 565, 571, 311 S.E.2d 780, 784 (1984). To convict Kelly of involuntary manslaughter, the Commonwealth had to prove beyond a reasonable doubt that Kelly committed

> acts of commission or omission of a wanton or willful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned, and [6] the offender knows, or is charged with the knowledge of, the probable results of his acts.

Bell v. Commonwealth, 170 Va. 597, 611-12, 195 S.E. 675, 681 (1938).

Similarly, Code § 18.2-371.1(B)(1) provides:

> Any parent, guardian, or other person responsible for the care of a child under the age of 18

> whose willful act or omission in the care of such child was so gross, wanton and culpable as to show a reckless disregard for human life shall be guilty of a Class 6 felony.

Both charges require proof that Kelly engaged in gross, wanton and culpable conduct which demonstrated a reckless disregard for human life. "Such conduct 'has come to be known as "criminal negligence."'" *Cottee v. Commonwealth,* 31 Va. App. 398, 400, 524 S.E.2d 132, 133 (2000) (citation omitted).

Criminal Negligence

Criminal negligence "must be something more than mere inadvertence or misadventure. It is a recklessness or indifference incompatible with a proper regard for human life." *Bell,* 170 Va. at 611, 195 S.E. at 681.

> Criminal negligence . . . is judged under an objective standard and, therefore, may be found to exist where the offender either knew or should have known the probable results of his acts. *See Keech* [*v. Commonwealth*], 9 Va. App. [272,] 279, 386 S.E.2d [813,] 817 [(1989)] (citing *Bell v. Commonwealth,* 170 Va. 597, 611-12, 195 S.E. 675, 681 (1938)). Thus, criminal negligence "'is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct *probably* would cause injury to another.'" *Tubman* [*v. Commonwealth],* 3 Va. App. [267,] 271, 348 S.E.2d [871,] 873 [(1986)] (emphasis added) (quoting *Griffin [v. Shively],* 227 Va. [317,] 321, 315 S.E.2d [210,]

213 [(1984)]; *Friedman v. Jordan,* 166 Va. 65, 68, 184 S.E. 186, 187 (1936)).

Conrad v. Commonwealth, 31 Va. App. 113, 121-22, 521 S.E.2d 321, 325-26 (1999) (*en banc*).

[7] Kelly was solely responsible for Frances, a twenty-one-month-old child. He strapped her into her car seat in the family van, thus placing her in a position in which she was rendered helpless. This position became lethal when Kelly, through his dereliction, left Frances in the vehicle and only quickly and casually instructed other children or a sixteen-year-old boy to get all the children out of the van and into the house. Kelly departed immediately without ensuring that his instructions were obeyed. Specifically, he abandoned Frances without ensuring that she was removed from her confinement in the car seat and lodged safely in the house. Thereafter, over the course of several hours, he made no further provisions for or inquiry about Frances. He busied himself with family matters and household repairs, at times within sight of the van in which Frances was trapped. During a period of over seven hours, Kelly assumed but never ascertained that Frances was asleep in the house. During that period, he made no provision for her care, nourishment, or safety. Expert testimony established that a child of Frances' age would require food, drink, sleep, and diaper changes over the course of a seven-hour period. Kelly made no effort to provide these necessities. He utterly ignored Frances.

The Beacher sisters explained that they had informed Kelly on at least three previous occasions that one of his children was locked in a vehicle. Thus, Kelly was on notice of this hazard. Nevertheless, Kelly failed to oversee Frances and, in complete dereliction of his duty to her, he

failed to investigate her whereabouts or well-being for an unreasonably long period of time.

The medical examiner testified that Frances could have survived only one and a half or two hours in the closed van. Kelly argues that only his omissions in that time frame are relevant to the charges against him. We disagree. His failure to inquire after Frances from the time he left her in the van to her discovery by the McIvors bespeak his total and utter disregard for her well-being, safety, and life.

[8] Accordingly, the record supports the jury's conclusion that Kelly knowingly engaged in conduct "so gross, wanton, and culpable as to show a reckless disregard of human life" which proximately caused Frances' death. We, therefore, affirm the convictions.

Affirmed.

APPENDIX B

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL DOCKET NOS. 53304 AND 53305 (Filed Feb. 27, 2000)
-vs-	:	
KEVIN CHRISTOPHER KELLY,	:	
Defendant.	:	

Prince William County Courthouse
Courtroom Number 2
Manassas, Virginia
Tuesday, November 19, 2002

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE ROSSIE D. ALSTON, JR., Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:17 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth

PAUL B. EBERT, ATTORNEY AT LAW
Commonwealth's Attorney

SANDRA R. SYLVESTER, ATTORNEY AT LAW
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

WILLIAM C. BOYCE, JR., ATTORNEY AT LAW

CARROLL A. WEIMER, JR., ATTORNEY AT LAW

* * *

[188] THE COURT: As counsel is aware, the standard for review at this point is in the light most favorable to the Commonwealth and the factual basis outlined by the Commonwealth's Attorney. The motion to strike is denied.

Your first witness?

(Mr. Weimer and Mr. Boyce conferred, off the record.)

MR. WEIMER: The defense is not going to present any evidence.

THE COURT: The defense rests?

MR. WEIMER: We rest.

Judge, at this time, of course, I would renew my motion to strike. I don't need to go over it, I've said everything, but the standard has changed at this point.

THE COURT: The Court is of the view that this is a determination that needs to be made by the fact finders whether or not they believe the conduct that has been suggested here on the part of Mr. Kelly is such that it rises to the level of criminal culpability.

The Court is going to give the jury the opportunity to make that determination.

VIRGINIA: IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
FEDERAL INFORMATION PROCESSING STANDARDS CODE: 153

Hearing Date: February 21, 2003
Judge: Rossie D. Alston, Jr.

COMMONWEALTH OF VIRGINIA

v.

KEVIN CHRISTOPHER KELLY,

Defendant

SENTENCING ORDER

The case(s) came before the Court for sentencing of the defendant, who appeared in person with counsel, Carroll Weimer. The Attorney for the Commonwealth was present.

On November 20, 2002, the defendant was found guilty of the following:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	CODE SECTION
CR53304	INVOLUNTARY MANSLAUGHTER (F)	05/29/2002	18.2-36
CR53305	RECKLESS ENDANGERMENT (F)	05/29/2002	18.2-371.1(B)

Presentence Report. The presentence report was considered and is ordered filed as a part of the record in accordance with the provisions of Section 19.2-299 of the Code of Virginia.

Sentencing Guidelines. Pursuant to the provisions of Section 19.2-298.01 of the Code of Virginia, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record.

Before pronouncing the sentence(s), the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

[2] **Sentencing.** The Court enters judgment on the verdict of the jury and sentences the defendant to:

Incarceration with the **Prince William-Manassas Regional Adult Detention Center** for the term of:

CR53304 – nine (9) months
CR53305 – three (3) months

for a total sentence of twelve (12) months.

This sentence shall run consecutively to all other sentences.

Suspension Of All Or Part Of Sentence(s). The Court suspends the following sentence(s):

CR53304/CR53305 -- all but a twenty-four (24) hour term every February 21, at 8:00 A.M., starting in the year 2004 and every year while on probation for a total sentence of six (6) days for the entirety of the sentence,

upon the following conditions:

Good Behavior. The defendant shall keep the peace and be of good behavior.

Supervised Probation. The defendant is placed on supervised probation to commence today or upon release from incarceration, under the supervision of a Probation Officer for a period as agreed upon by both parties of:

CR53304 – seven (7) years
CR53305 – seven (7) years

to run concurrently, for a total of seven (7) years supervised probation, unless sooner released by the Court. The defendant shall comply with all the rules and requirements set by the Probation Officer and as shown on Form PPS 2 of the Virginia Department of Corrections, which are included herein by reference thereto.

Court Costs. It is further ordered as special condition of the defendant's supervised probation that the defendant pay the court costs in accordance with a payment plan to be established by the Probation Office, which plan must result in any fines and/or court costs being fully paid during the probationary period.

[3] **Judgment For Court Costs.** The Court orders the Clerk of this Court to docket a judgment against the defendant for the court costs.

Other Special Conditions Of Probation. Special conditions of the defendants probation are as follows:

1. Defendant shall have a modified home study coordinated with the Probation Office and the Manassas Department of Social Services

done with a report every sixty (60) days until further notice to the Court under seal,

2. Defendant shall coordinate and conduct a blood drive in Frances' name, known as "The Frances Kelly Blood Drive" through the American Red Cross on Saturday next succeeding the anniversary date of Frances' death for the duration of probation, specifically May 24, 2003, May 22, 2004, May 21, 2005, May 20, 2006, May 26, 2007 and May 24, 2008, with a goal of one hundred (100) pints of blood every year, and

3. Defendant shall participate as a volunteer provider for participation in the Adult Detention Center Life Skills Program, and shall be required to take voluntary preparatory course for this program and contribute a minimum of two (2) hours per week to this program during the term of his probation

under the supervision of a Probation Officer.

DNA Analysis. As a condition of the suspended sentence, the Court Orders the defendant to report to the Prince William-Manassas Regional Adult Detention Center for the purpose of taking a blood sample for DNA analysis pursuant to Section 19.2-310.2 of the 1950 Code of Virginia, as amended, et seq. on February 24, 2003, by 5:00 A.M.

Right To Appeal. The Court proceeded to advise the defendant of the right to appeal, including the right to note defendant's appeal to the appropriate Appellate Court, with due and timely written notice to the Clerk of this Court, and the right to have an attorney to represent

the defendant or to have an attorney appointed to represent the defendant and to have the attorney's fees, costs and expenses in connection with any appeal paid for in the event the defendant is financially unable to pay same.

Court Appointed Attorney For Appeal. Upon the representations of the defendant that the defendant has retained counsel herein the Court instructs Carroll Weimer, to advise the defendant should the defendant elect to appeal the matter(s).

Attorney Certification. The Court certifies that at all times during the trial the defendant was personally present, as was defense counsel who capably represented the defendant.

The defendant is allowed to depart under the previsions [sic] set forth above.

ENTERED: 3/03/03

/s/ Rossie D. Alston, Jr.
ROSSIE D. ALSTON, JR., JUDGE

DEFENDANT IDENTIFICATION:

SSN: **317-52-7625** DOB: **06/18/1956** Sex: **Male**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: twelve (12)months

TOTAL SENTENCE SUSPENDED: **all but a twenty-four (24) hour term every February 21, at 8:00 A.M., starting in the year 2004 and every year while on probation for a total sentence of six (6) days for the entirety of the sentence**

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL DOCKET NO. 53304-05
-vs-	:	
KEVIN CHRISTOPHER KELLY,	:	(Filed Mar. 28, 2003)
Defendant.	:	

Circuit Courtroom 2
Prince William County Courthouse
Manassas, Virginia

Thursday, March 6, 2003

The above-entitled matter came on to be heard before THE HONORABLE ROSSIE D. ALSTON, JR., JUDGE, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:10 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth

PAUL B. EBERT, ESQUIRE
Commonwealth Attorney

SANDRA R. SYLVESTER, ESQUIRE
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

CARROLL A. WEIMER, JR., ESQUIRE
EDWIN VIEIRA, JR., ESQUIRE

Also Present:

Eileen P. Harrington, Probation Officer

* * *

[31] And once again, I ask Your Honor to set aside the verdicts.

THE COURT: Well, contrary to what some may believe, this Court is not in the business of playing God. It's simply to ask you to try to obtain the ends of justice from the facts and circumstances presented.

In this case, it's clear to the Court that the jury had the opportunity to consider the facts of the case from the appropriate legal standards.

Typically the Court instructed the jury among other things of the Commonwealth's duty to prove Mr. Kelly's guilt beyond a reasonable doubt.

The motion to set aside the verdicts is not an appropriate mechanism to challenge a determination of the jury and interpretation of the facts by the jury.

The theory today is inconsistent with the trial theory. The trial theory was fact based and the Court's view is that the jury and the Court considered same in the context of both guilt and innocence and sentencing.

I would suggest that had this view been [32] articulated at the trial, the Court's view is that it clearly would not have affected the determination contrary to what the jury decided as far as guilt or innocence.

I would suggest to you all that it probably would have impacted the jury's determination as to the appropriate sentence in this case. I believe that under the circumstances in this case, the jury had a lot of compassion for Mr. Kelly in it's determination of the appropriate sentence in this case.

And I know for a fact that this Court had a lot of compassion for Mr. Kelly as far as the appropriate sentence in this case.

Under the appropriate legal standards, there was no plain deviation of right injustice in the circumstances of this case. The motion to set aside the verdicts is denied.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday ***the*** 23rd ***day of*** June, 2004.

Kevin Christopher Kelly, Appellant,

against Record No. 040643
Court of Appeals No. 0762-03-4

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia H. Krueger, Clerk

By: /s/ [Illegible]

Deputy Clerk

APPENDIX C

VIRGINIA:

In the Court of Appeals of Virginia on Monday ***the*** 1st ***day of*** March, 2004.

Kevin Christopher Kelly, Appellant,

against Record No. 0762-03-4
Circuit Court Nos. CR53304 and CR53305

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing En Banc

Before Chief Judge Fitzpatrick, Judges Benton, Elder Annunziata, Bumgardner, Frank, Humphreys, Clements, Felton, Kelsey and McClanahan

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 3rd day of February, 2004 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ [Illegible]

Deputy Clerk

APPENDIX D

Constitution of the United States

Amendment XIV, Section 1.

> * * * No State shall make or enforce any law which abridges the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of the Commonwealth of Virginia

Code of Virginia, Section 18.2-36.

> **§ 18.2-36. How involuntary manslaughter punished.** Involuntary manslaughter is punishable as a Class 5 felony.

Code of Virginia, Section 18.2-371.1(B).

> **§ 18.2-371.1. Abuse and neglect of children; penalty. –**
>
> * * *
>
> B. Any parent, guardian, or other person responsible for the care of a child under the age of eighteen whose willful act or omission in the care of such child was so gross, wanton and culpable as to show a reckless disregard for human life shall be guilty of a Class 6 felony.

[This subsection is now numbered § 18.2-371.1(B)(1).]

Common-law standards of criminal negligence in Virginia

This court, in the absence of statute, has defined involuntary manslaughter in substantially the terms uniformly adopted in this country. In *Mundy v. Commonwealth*, 144 Va. 609, 131 S.E. 242, 244, Judge Chichester approves the following definition: "'Involuntary manslaughter is the killing one accidentally, contrary to the intention of the parties, in the prosecution of some unlawful, but not felonious, act; or in the improper performance of a lawful act.'" (Cases cited.)

Mr. Chief Justice Prentis, in *Goodman v. Commonwealth*, 153 Va. 943, 151 S.E. 168, 171, after discussing the application of this definition to a homicide committed in the operation of a motor vehicle says:

"The precise grade of such a homicide, whether murder or manslaughter, depends upon the facts of the particular case. One, however, who accidentally kills another, even though he may be chargeable with some actionable negligence, is not guilty of a crime, unless his negligence is so gross and culpable as to indicate a callous disregard of human life and of the probable consequences of his act. The crime is imputed because of recklessness, and where there is no recklessness there is no crime."

The courts and the authorities agree, in the absence of statutory regulations, that a higher degree of negligence is required to establish criminal negligence than to establish liability in a civil action. The negligence required in a criminal proceeding must be more than the lack or ordinary care and precaution. It must be something

more than mere inadvertence or misadventure. It is a recklessness or indifference incompatible with a proper regard for human life. It must be shown that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on the conduct of the offender. 99 A.L.R. 829; 5 Am. Jur. 927; *Cain v. State*, 55 Ga. App. 376, 190 S.E. 371.

It is most difficult to define and determine "gross and culpable negligence" in brief terms applicable to every situation. No completely satisfactory definition covering every situation has yet been given. The definitions given are restricted almost invariably to the facts of the particular case. The term "gross and culpable negligence" is descriptive of conduct. The very nature of the word "gross" indicates that it is more than mere or ordinary negligence, – it is an aggravated or increased negligence. It is such negligence as may be often best evidenced by a series of acts of commission or omission indicating a state of mind or lack of thought of the offender. The commissions or omissions may be dependent, independent, interdependent, or cumulative, provided there is some causal relation to the state of mind, or to the acts of the offender with the offense charged. The word "culpable," in popular use and acceptation, means deserving of blame or censure. "Gross negligence" is culpable or criminal when accompanied by acts or commission or omission of a wanton or wilful nature, showing a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it not improbable that injury will be occasioned,

> and the offender knows, or is charged with the knowledge of, the probable results of his acts.

Bell v. Commonwealth, 170 Va. 597, 610-12, 195 S.E. 675, 680-81 (1938). *Accord, e.g., Zirkle v. Commonwealth*, 189 Va. 862, 868-69, 55 S.E.2d 24, 28 (1949); *Cable v. Commonwealth*, 243 Va. 236, 240, 415 S.E.2d 218, 220 (1992).

Relevant Rules of the Supreme Court of Virginia

Rule 3A:15. Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial.

(a) *Motion to Strike Evidence.* – After the Commonwealth has rested its case or at the conclusion of all the evidence, the court on motion of the accused may strike the Commonwealth's evidence if the evidence is insufficient as a matter of law to sustain a conviction. * * *

(b) *Motion to Set Aside Verdict.* – If the jury returns a verdict of guilty, the court may, on motion of the accused made not later than 21 days after entry of a final order, set aside the verdict for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction.

(c) *Judgment of acquittal or New Trial.* – The court shall enter a judgment of acquittal if it strikes the evidence or sets aside the verdict because the evidence is insufficient as a matter of law to sustain a conviction. The court shall grant a new trial if it sets aside the verdict for any other reason.

Rule 5:17. Petition for Appeal.

* * *

(c) *Form and Content.* – Under a separate heading entitled "Assignments of Error," the petition shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this Court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this Court. An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. If a petition for appeal does not contain assignments of error, the appeal will be dismissed.

Under another separate heading entitled "Questions Presented," the petition shall list the questions upon which the appellant intends to submit argument, with a clear and exact reference to the particular assignment of error to which each question relates.

Rule 5A:18. Questions to Be Considered. No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal.

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA -vs- KEVIN CHRISTOPHER KELLY, Defendant.	CRIMINAL DOCKET NOS. 53304 AND 53305 (Filed Feb. 27, 2000)

Prince William County Courthouse
Courtroom Number 2
Manassas, Virginia

Tuesday, November 19, 2002

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE ROSSIE D. ALSTON, JR., Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:17 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

PAUL B. EBERT, ATTORNEY AT LAW
Commonwealth's Attorney

SANDRA R. SYLVESTER, ATTORNEY AT LAW
Assistant Commonwealth's Attorney

On Behalf of the Defendant:

WILLIAM C. BOYCE, JR., ATTORNEY AT LAW

CARROLL A. WEIMER, JR., ATTORNEY AT LAW

[180] AFTERNOON SESSION

(The Court reconvened at approximately 2:09 o'clock p.m.)

THE COURT: Is there anything we need to do before we bring the jury back?

MR. WEIMER: Yes, Your Honor. I have a motion to strike.

THE COURT: Go ahead, sir.

MR. WEIMER: Judge, the Commonwealth's evidence fails to prove as a matter of law the charges against Mr. Kelly. There's no evidence that Kevin Kelly did anything so gross, wanton and culpable as to show a reckless disregard for Frances's life.

He's charged with involuntary manslaughter. It's the unintentional killing which was the direct result of negligence so gross wanton and culpable as to show a callous disregard of human life.

He's charged with reckless endangerment or child abuse and neglect and the one thing that they have failed to prove is that Mr. Kelly's willful act or omission in the care of Frances Kelly was so gross, wanton and culpable as to show a reckless disregard for human life.

[181] The evidence is clear and uncontroverted that Frances died from hypothermia in the car that day and there's been a lot of evidence of that.

The evidence is also clear that Mr. Kelly's statement that the Commonwealth introduced into evidence that when he came back from this trip with the three oldest – three of the older children and three of the youngest children that he asked the older children to get the young ones out. He was going back to get Kate and come back for lunch.

Now, the only evidence before the Court is that Mr. Kelly asked his older children – there is no evidence whatsoever that he left the child, left Frances, in the van, none whatsoever.

In fact, the Commonwealth's own evidence is is that he told somebody – told the older children to take Frances out of the car, take the younger children out and they did take two of them out and the third one, Frances, was forgotten.

The evidence is not that he – it doesn't show that he did anything other than what a father should do and that is to make arrangements for his children, make sure that they're taken care of. He asked his older [182] children to do that.

There is no evidence before the Court whatsoever that there was any reason why he couldn't or shouldn't rely on those children to do what he had asked them to do.

Now, with regard to the issue of – well, let me stop there, but there is – the only act that Mr. Kelly is accused of doing is parking his car in front of his house, getting out after telling his kids to get the young ones out.

Now, with regard to the issue of notice of whether or not it's not good to leave kids in a car or that something may result, the only evidence of that is the evidence of the Beachers who testified that on three occasions there was – and I'll describe the child as an infant. They said, I believe, younger than three or four – in a car seat parked in the driveway, in the van.

They said that they heard whimpering and crying. So, certainly the – it appears from that that a window or something had to be open, but we don't know that for sure.

The only other evidence is that Mr. Kelly came out. As soon as they brought it to his attention, he went [183] and got the child.

Also the Commonwealth's own witness testified that the van in which the child was found in each of those three occasions was normally driven by Mrs. Kelly and that they didn't know who drove it in there and parked it in there that day.

I submit to the Court that based on the evidence before the Court – and I'd cite to the Court the case of Ellis versus Commonwealth, which I'm sure the Court is well aware of.

In that case the Defendant left an apartment for a period of time after turning on a burner on the stove to light a cigarette and she obviously left the burner on and she left her children in there. I believe the ages were four and two.

She left them in there alone while she went somewhere else. While she was there, while she was somewhere else, standing on a porch, I believe it was, of

another neighbor's house, she heard sirens and it was discovered that her house was on fire.

The Court in that case found that there was not sufficient evidence to show that what she did was so gross, wanton and culpable as to show a reckless disregard [184] for human life. That's leaving infants alone in a house and she was the one who actually turned the burner on.

Now, the evidence is also clear that she didn't intentionally leave the burner on, but the Kelly case or the case that's been presented to Your Honor so far does not rise to the level of even the Ellis case, and as a result I ask the Court to strike the Commonwealth's evidence at this point.

THE COURT: Mr. Ebert.

MR. EBERT: If it please the Court, very briefly, I think there's ample evidence before this Court to make the issue of whether or not the Defendant is guilty as charged a jury issue.

I would submit to the Court without any other evidence, the fact that a young child this age, who from the testimony requires constant supervision, is left not one hour, not two hours, but seven hours in a car with nobody checking on her, that's gross negligence, I would submit, on its face.

In addition, the medical testimony indicates the child had to be fed, diapers had to be changed, the child had to be taken care of. This is a child that was left unattended for a long, long period of time.

[185] Now, the evidence – there is some evidence that the Defendant said in his statement to the police that, "I

asked Anthony to take her out of the car," but there is no evidence before this Court whatsoever that he entrusted anybody to watch this child for any length of time.

If we look at the evidence before this Court, Anthony is out in the yard working on a fence during this period of time. If he allegedly or claimed to be watching this child, that could – there's just no evidence of it.

Counsel tells you I told the jury in opening statement that unfortunately the child was put down – that was her nap time. There's no evidence that that was the child's nap time and even if it was, the child isn't going to sleep for any seven hours.

The law is pretty clear. In addition to that, we have notice from the neighbors, who were very concerned about other children having been left in the van, and he certainly had to know that that was a possibility and he certainly had to know that the children at least were crying, upset at the prospect of being left alone in a van where perhaps something could have happened to them.

Those cases were in the hot summertime and I [186] would say to the Court, from the evidence before this Court, this was an accident waiting to happen and it's certainly a gross omission. No one said this is a willful act, but it is certainly a gross, culpable omission.

When you look at the case which the Court had before you, the Conrad case, the language in there is pretty clear. "Criminal negligence is a basis for involuntary manslaughter and is judged on an objective standard and therefore may be found to exist where the Defendant knew or should have known the probable results of his acts."

It goes on to say, and it cites in that case a number of cases, "Criminal negligence, acting in conscious disregard of another person's right or acting with reckless indifference to the consequences with the Defendant aware from his knowledge of existing circumstances and conditions, that his conduct would probably cause injury to another," and certainly we've got in this case clear, clear evidence of that.

I would suggest to the Court it's a jury question. The jury is the trier of fact. The jury is going to determine whether or not this was gross negligence within the meaning of the Court's instruction. [187] So, I ask the Court to deny the motion to strike.

MR. WEIMER: Judge, the cases that Mr. Ebert cited deal with existing circumstances. You don't have to prove that anything was intentional. Their evidence is and their charges that it was unintentional, but they refer to existing circumstances.

What the Commonwealth has to prove is that the existing circumstances as known to Mr. Kelly at the time were sufficient to at least get past this motion to strike, were sufficient to give him knowledge that his actions were gross, wanton and culpable or that he had some duty to do something at that point.

Now, what we have – the Commonwealth's own evidence says – and this is Mr. Kelly's written statement the Commonwealth introduced into evidence. In it he says, "We got lunch on and I assumed Frances was taking her nap, which was normal for early afternoon."

The evidence is also from Dr. Field that Frances is likely to have been dead after an hour and a half to two

hours. The Commonwealth keeps making a big deal out of the seven hour time period.

Now, I submit to the Court there is no evidence – there isn't sufficient evidence to find Mr. [188] Kelly guilty of this.

THE COURT: As counsel is aware, the standard for review at this point is in the light most favorable to the Commonwealth and the factual basis outlined by the Commonwealth's Attorney. The motion to strike is denied.

Your first witness?

(Mr. Weimer and Mr. Boyce conferred, off the record.)

MR. WEIMER: The defense is not going to present any evidence.

THE COURT: The defense rests?

MR. WEIMER: We rest.

Judge, at this time, of course, I would renew my motion to strike. I don't need to go over it, I've said everything, but the standard has changed at this point.

THE COURT: The Court is of the view that this is a determination that needs to be made by the fact finders whether or not they believe the conduct that has been suggested here on the part of Mr. Kelly is such that it rises to the level of criminal culpability.

The Court is going to give the jury the opportunity to make that determination.

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA,	:	
v.	:	**CRIMINAL Nos. 53304 & 53305**
KEVIN CHRISTOPHER KELLY,	:	(Filed Feb. 27, 2003)
Defendant.	:	

DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS AND ENTER JUDGMENTS OF ACQUITTAL

COMES NOW the defendant, Kevin Kelly, by counsel, pursuant to Rule 3A:15 of the Rules of the Supreme Court of Virginia, and moves this Court for an Order: (i) setting aside the verdicts in Criminal Nos. 53304 & 53305, on the grounds that the evidence adduced at trial is insufficient as a matter of law to sustain the convictions, the charges are void for vagueness as applied, and the verdicts deny due process of law; and (ii) entering judgments of acquittal on both charges. As grounds therefor and in support thereof, Kevin Kelly refers this Court to, and fully incorporates herein, his MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTOIN TO SET ASIDE THE VERDICTS AND ENTER JUDGMENTS OF ACQUITTAL, with EVIDENTIARY APPENDICES and ATTACHMENTS, Filed with this MOTION.

KEVIN C. KELLY
By Counsel

/s/ Edwin Vieira, Jr.
EDWIN VIEIRA, JR., ESQ.
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Manassas, Virginia 20112
703-791-6780

CO-COUNSEL FOR KEVIN KELLY

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA,	:	
v.	:	**CRIMINAL Nos. 53304 & 53305**
KEVIN CHRISTOPHER KELLY,	:	(Filed February 27, 2003)
Defendant.	:	

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO SET ASIDE THE VERDICTS AND ENTER JUDGMENTS OF ACQUITTAL, with EVIDENTIARY APPENDICES and ATTACHMENTS

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* * *

[1] INTRODUCTION

Kevin Kelly has moved this Court to set aside the verdicts. This Memorandum proves that the evidence is insufficient as a matter of law, the charges are void for vagueness as applied, and the verdicts deny due process; and that this Court should enter judgments of acquittal.

* * *

[4] the [Kellys'] doorbell and [Amber] went over and checked on the kid." Kevin Kelly answered the door; but Amber did not hear any conversation between Kevin Kelly and her friend. TR-2 at 141-43.

The jury convicted Kevin Kelly of common-law involuntary manslaughter, and of violating Virginia Code § 18.2-371.1(B).

ARGUMENT

THIS COURT MUST SET ASIDE THE VERDICTS AND ENTER JUDGMENTS ON ACQUITTAL, BECAUSE THE COMMONWEALTH FAILED: TO PROVE THAT A HOMICIDE WAS NOT IMPROBABLE UNDER ALL THE FACTS EXISTING AT THE TIME, AND THAT THIS KNOWLEDGE OF SUCH FACTS SHOULD HAVE INFLUENCED KEVIN KELLY'S BEHAVIOR; AND TO EXCLUDE EVERY HYPOTHESIS EXCEPT THAT OF GUILT. MOREOVER, THE CHARGES ARE VOID FOR VAGUENESS AS APPLIED. AND THE VERDICTS DENY DUE PROCESS OF LAW.

This Court must set aside the verdicts and enter judgments of acquittal, because the verdicts are "'plainly wrong [and] without evidence to support [them].'" *Juares* v. *Commonwealth*, 26 Va. App. 154, 156, 493 S.E.2d 677, 678 (1997). And for that and other reasons they deny due process of law.

* * *

[6] **II. THE APPLICABLE EVIDENTIARY STANDARD: The Commonwealth was required to exclude every reasonable hypothesis except that Kevin Kelly knew or should have known that his behavior would probably have resulted in Frances Kelly's death.**

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt", and requires evidence "to convince a [jury] beyond a reasonable doubt * [7] * * of every element of the offense". *Jackson* v. *Virginia*, 443 U.S. 307, 309, 316 (1979). The evidence, viewed in the light most favorable to the Commonwealth, must go further than to create a mere "suspicion * * * or even a probability of guilt"; it "must exclude every reasonable hypothesis of innocence". *Bishop* v. *Commonwealth*, 227 Va. 164, 170, 313 S.E.2d 390, 393 (1984). Kevin Kelly's "guilt * * * is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." *Cameron* v. *Commonwealth*, 211 Va. 108, 110-11, 175 S.E.2d 275, 276-77 (1970). This "'does not leave the jury at liberty to guess, and where a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him.'" *Wooden* v. *Commonwealth*, 117 Va. 930, 935, 86 S.E. 305, 307 (1915).[9]

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[9] Even in civil litigation where a mere preponderance of the evidence suffices to establish liability, "if a jury bases its conclusions and inferences on speculation and conjecture, a plaintiff's case fails." *Fobbs* v. *Webb Building Limited Partnership*, 232 Va. 227, 230, 349 S.E.2d 355, 357 (1986). *Accord, O'Brien* v. *Everfast, Inc.*, 254 Va. 326, 330, 491 S.E.2d 712, 714 (1997); *Simmons* v. *Miller*, 261 Va. 561, 572-73, 544 S.E.2d 666, 673 (2001). "'Suspicion cannot give probative force

(Continued on following page)

III. ANALYSIS OF THE EVIDENCE IN LIGHT OF THE STANDARDS: This Court must set aside the verdicts, because the Commonwealth failed to prove that Kevin Kelly knew or should have known a homicide was not improbable under all the facts existing at the time, and that his knowledge should have influenced his behavior.

A. This Court must set aside Kevin Kelly's convictions, because:

• Contrary to *Jackson* v. *Virginia*, 443 U.S. 307, 309 316 (1979), the Commonwealth presented no evidence that could "convince a [jury] beyond a reasonable doubt of the existence of [the key] element of the offense": to wit, that Kevin Kelly knew or should have known that Frances was in danger when he placed her in his older children's care, and thereafter did not personally monitor her. The Commonwealth failed to prove that he knew or should have know his behavior could or would cause, as its "probable result[]" or "probable consequence[]", Frances's death; that "a homicide was not [8] improbable under all of the facts existing at the time"; or that her death could result from his "particular conduct". *Conrad* v. *Commonwealth*, 31 Va. App. 113, 121-22, 521 S.E.2d 321, 325-26 (1999); *Goodman* v. *Commonwealth*, 153 Va. 943, 952, 151 S.E. 168, 171 (1930); *Bell* v. *Commonwealth*, 170 Va. 597, 611, 195 S.E. 675, 681 (1938); *Ellis* v. *Commonwealth*, 29 Va. App. 548, 554, 513 S.E.2d 453, 456 (1999). Instead, far

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to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'" *Chesapeake & Ohio Railway Co.* v. *Seay*, 195 Va. 566, 572, 79 S.E.2d 631, 634 (1954). And "[n]o judgment * * * can rest upon guesswork." *Toler* v. *Yellow Cab Co.*, 179 Va. 38, 40, 18 S.E.2d 250, 251 (1942).

from being "inconsistent with [Kevin Kelly's] innocence", *all* the evidence *supports* it. *See Cameron* v. *Commonwealth*, 211 Va. 108, 110-11, 175 S.E.2d 275, 276 (1970).

• Contrary to *Leary* v. *United States*, 395 U.S. 6, 36 (1969), and *Sharp* v. *Commonwealth*, 213 Va. 269, 271-72, 192 S.E.2d 218, 218-19 (1972), the jury's inference that Kevin Kelly knew or should have known that Frances was in danger is irrational, arbitrary, and unconstitutional, because it does not follow with substantial assurance from any fact proved.[10]

• Contrary to *Wooden* v. *Commonwealth*, 117 Va. 930, 935, 86 S.E. 305, 307 (1915), the jury has improperly been left "'at liberty to guess'" and has "'arbitrarily adopt[ed] that interpretation [of the evidence] which incriminates'" Kevin Kelly.

• Contrary to *Ellis* v. *Commonwealth*, 29 Va. App. 548, 555-56, 513 S.E. 453, 457 (1999), the verdicts rest only on Kevin Kelly's arguable "inattention and inadvertence" to Frances's care. And,

• Contrary to numerous precedents (canvassed below), the verdicts deny any due process of law.

* * *

[12] In the ultimate analysis, this case turns decisively on what happened between 1:10 pm,. when Kevin Kelly first returned home after Frances (unbeknownst to him) had been left in the van, and 2:40 pm, when he left

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[10] These cases dealt with "presumptions". But a "presumption" is merely "an inference as to the existence of the fact not certainly known from the known or proved existence of some other fact". *Webster's Third New International Dictionary* (1971), at 1796.

the house again, not to return until 4:00 pm. For it was between 2:10 and 3:00 pm that Frances died. The Commonweath [sic] claims that Kevin Kelly is guilty because he never asked, "Where's Frances?" *See* TR-2 at 219 (closing argument). To which the complete answer is that, according to his statement, he "assumed Frances was taking her nap which was normal for early afternoon." This is the *only* evidence on the matter – undisputed and undisputable. His assumption was objectively reasonable, supported by both common experience and expert opinion. *See* TR-2 at 163 (Dr. Foster). And it cannot be impugned as even the "inattention and inadvertence" held *not* "subject to criminal penalty" in *Ellis*, because, unlike Ellis, who knew that her children were unattended, Kevin Kelly believed that, pursuant to his instructions, Frances had been taken inside. *See post*, at 14-15.

b. If (as the Commonwealth urged) the jury concluded that Kevin Kelly was guilty simply because seven hours elapsed, its inference is irrational, arbitrary, and unconstitutional, inasmuch as the conclusion does not follow with substantial assurance from the predicate fact. *See Leary* v. *United States*, 395 U.S. 6, 36 (1969); *Sharp* v. *Commonwealth*, 213 Va. 269, 271-72, 192 S.E.2d 217, 218-19 (1972). Therefore, the verdicts must be set aside. For, "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Leary*, 395 U.S. at 31-32. *Accord, Owens* v. *Commonwealth*, 211 Va. 633, 639 & n.7, 179 S.E.2d 477, 481 & n.7 (1971). *See Mills* v. *Maryland*, 486 U.S. 367, 375-76 (1988); *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957); *Bunting* v. *Commonwealth*, 208 Va. 309, 314-15, 157 S.E.2d 204, 208 (1967).

* * *

[21] **c.** To infer Kevin Kelly's criminal negligence on the day *sub judice* from prior instances of *imagined* wrongdoing *by particular persons unknown, under circumstances in material particulars undescribed*, is irrational, arbitrary, and unconstitutional, because it cannot be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact. And, therefore, even were "notice" merely an alternative theory of culpability – rather than, as the Commonwealth asserted, a key "element of the charged offense" – the verdicts would have to be set aside. *See* the authorities collected *ante*, at 12. Moreover, absent any legitimate inference derivable from the prior [22] events, the Beachers' testimony counts as no evidence at all – upon which, self-evidently, no verdict of guilty can be predicated. *See Burks* v. *United States*, 437 U.S. 1, 11, 16-18 (1978); *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 & n.13 (1960); *Garner* v. *Louisiana*, 368 U.S. 157, 170-74 (1961).

d. The Commonwealth promoted the Beachers' testimony "to show [Kevin Kelly] had knowledge that his actions were endangering his children *and specifically the victim* [*i.e.*, Frances] * * * *and to show an element of the charged offense * * * to establish an element of the offense*". *Commonwealth's Response to the Defense Motion in Limine*, at 3-4 (emphasis supplied).[22] This improperly dispensed with the requirement of proof that Kevin Kelly knew or should have known that "a homicide was not

[22] It is perhaps to bring owls to Athens to observe that the events as to which the Beachers testified occurred *before Frances Kelly was born*, and therefore – unless processed through a science-fiction time machine – could not possibly "show an element of the charged offense" as to her.

improbable under all of the facts *existing at the time [of the alleged offense]*",[23] by imputing to him knowledge *based on earlier events as to which the Commonwealth proved almost nothing about what actually happened, and nothing at all about anyone's wrongdoing*!

1) Substitution of amorphous "notice" from long-prior events for a specific showing of knowledge that "a homicide was not improbable under all of the facts existing at the time [of the alleged offense]" violates the rule that "criminal statutes are to be strictly construed in favor of the defendant and cannot be extended by construction or implication to favor the Commonwealth." *Johnson* v. *Commonwealth*, 211 Va. 815, 819, 180 S.E.2d 661, 664 (1971).

2) It also renders both the common-law and statutory crimes void for vagueness as applied, even though the substitution derives from judicial construction of the crimes or interpolation of an otherwise valid rule of evidence. *Compare, e.g., Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 73 (1911) (state court's construction is part of the statute), *with* Ex parte *Virginia*, 100 U.S. 339, 346-47 (1880) [23] (Fourteenth Amendment's prohibitions apply to a State's judicial authorities).[24] "Unless an act creating a statutory offense satisfies th[e] requirement of certainty and definiteness it violates the Due Process Clauses of the Fourteenth Amendment and of the Virginia Constitution." *Caldwell* v. *Commonwealth*, 198 Va. 454,

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[23] *Bell*, 170 Va. at 611, 195 S.E. at 681.

[24] As to the timelines of this objection, *See Pine* v. *Commonwealth*, 121 Va. 812, 820-21, 93 S.E. 652, 654 (1917); *Burnette* v. *Commonwealth*, 194 Va. 785, 786, 75 S.E.2d 482, 483 (1953).

458, 94 S.E.2d 537, 540 (1956). *See* U.S. Const. amend. XIV, § 1, Virginia Const. art. I, §§ 8, 11. "[A] penal statute must be definite and certain to be valid, and it denies due process of law if it is vague or ambiguous". *Sharp* v. *Commonwealth*, 213 Va. 269, 271, 192 S.E.2d 217, 218 (1972). A statute fails to meet constitutional muster when it is "doubtful * * * whether a person of ordinary intelligence would know from the language of the ordinance whether * * * such activity was prohibited." *Wiley* v. *County of Hanover*, 209 Va. 153, 157, 163 S.E.2d 160, 163 (1968). Moreover, "'[i]f the terms in which * * * [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative'". *Mundy Motor Lines* v. *E.I. Du Pont De Nemours & Co.*, 199 Va. 933, 937-38, 103 S.E.2d 245, 248 (1958). "An ordinance is void for vagueness if it fails to give a reasonably intelligent person fair notice that his contemplated conduct is forbidden by the enactment, and if 'it encourages arbitrary and erratic arrests and convictions.'" *Flannery* v. *City of Norfolk*, 216 Va. 362, 366, 218 S.E.2d 730, 733 (1975); *Stanley* v. *City of Norfolk*, 218 Va. 504, 509, 237 S.E.2d 799, 802 (1977). The rule is the same in the courts of the United States. *E.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983); *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979); *Smith* v. *Goguen*, 415 U.S. 566, 574-75 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972).

The Commonwealth's theory of culpability based on "notice" fails predictably to define punishable behavior, because it criminalizes conduct in the present with fantastical misinterpretations of innocent conduct from the past. Before the theory was broached to him at trial, Kevin

Kelly could not [24] possibly have known that, by instructing his older children to take Frances out of the van while he attended to other matters, he was potentially committing criminal negligence if some accident supervened, because, years earlier, on certain occasions the Beachers had seen some other children in the van, but knew nothing about the circumstances surrounding those incidents. Therefore, the verdicts must be set aside as violative of due process.

In sum, this Court must set aside the verdicts, because no evidence supports them, and enter judgments of acquittal. Not to do so would deny Kevin Kelly due process of law. *See Burks* v. *United States*, 437 U.S. 1, 11, 16-18 (1978); *Johnson* v. *Florida*, 391 U.S. 596, 598-99 (1968); *Barr* v. *City of Columbia*, 378 U.S. 146, 150-51 (1964); *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 & n.13 (1960); *Garner* v. *Louisiana*, 368 U.S. 157, 170-74 (1961). Moreover, the Commonwealth's theory of "notice", as applied, denies due process in and of itself.

* * *

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA,	:	CRIMINAL DOCKET
-vs-	:	NO. 53304-05
KEVIN CHRISTOPHER KELLY,	:	(Filed Mar. 23, 2003)
Defendant.	:	

Circuit Courtroom 2
Prince William County Courthouse
Manassas, Virginia

Thursday, March 6, 2003

The above-entitled matter came on to be heard before THE HONORABLE ROSSI D. ALSTON, JR., JUDGE, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:10 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

PAUL B. EBERT, ESQUIRE
Commonwealth Attorney

SANDRA R. SYLVESTER, ESQUIRE
Assistant Commonwealth's Attorney

On Behalf of the Defendants:

CARROLL A. WEIMER, JR., ESQUIRE
EDWIN VIEIRA, JR., ESQUIRE

Also Present:

Eileen P. Harrington, Probation Officer

[2] PROCEEDINGS

(The Court Reporter was sworn by the Clerk of the Court.)

THE COURT: Let the record reflect this is the case of the Commonwealth of Virginia versus Kevin Christopher Kelly, Criminal numbers 53304 and 53305.

Present for the Commonwealth is the Assistant Commonwealth's Attorney, Ms. Sandy Sylvester. Mr. Paul Ebert, the Commonwealth's Attorney is also present. Mr. Edwin Vieira and Mr. Carroll Weimer are present for Mr. Kelly. Mr. Kelly is also present.

This matter comes on a motion to set aside the verdict.

Counsel, I have had occasion to read the briefs that have been filed in this matter. I would suggest to counsel that thirty minutes for both sides of your motion should be enough to explain your position.

Be assured that having sat through this matter for the last three weeks or so that I'm aware of the facts involved.

Having said that, Mr. Vieira.

MR. EBERT: Your Honor, may I make a brief opening statement to that?

[3] THE COURT: Yes, sir.

MR. EBERT: One point of clarification – perhaps counsel can – would this be a motion to set aside the verdict and ask for a new trial? Is that what –

MR. WEIMER: No. Set aside the verdict and –

MR. EBERT: So you do not want a new trial?

MR. WEIMER: No. No one's asking for a new trial.

MR. EBERT: Your Honor, basically the Commonwealth's position is that this is merely an attempt to re-mitigate this matter. As counsel points out, he doesn't agree with the jury's interpretation of the evidence, Your Honor's interpretation of the evidence.

And nothing new has been raised to the extent that there is a new prospect. That was not preserved in the record. It cannot be raised at this time under the rules.

So I would suggest to the Court that the brief at least indicates that counsel's interpretation – of course it's something we don't agree with – is not appropriate and is something this Court has already ruled on. The evidence is there. You've heard it over a lengthy period of time.

[4] I think it was properly suited to the jury. The jury had evidence that they properly ruled upon. And that would be the Commonwealth's position throughout the argument in this matter.

Ms. Sylvester, with the Court's permission, will argue specifically the issues that have been raised by counsel.

THE COURT: All right. It's your motion, Mr. Vieira.

MR. VIEIRA: Your Honor, what's your position about where I stand with respect to this chart?

THE COURT: Position it so I can see it.

MR. VIEIRA: I'll put it right here (indicating). You also have a copy of –

THE COURT: Ms. Sylvester, if you all want to position yourself where you can see.

MR. VIEIRA: Well, she has a photo of it. A photo has been given to them and there's a photo for you, Your Honor. It's an exact copy of this.

Let me, as a preliminary matter, just address what Mr. Ebert said that the constitutional issues that are raised in the brief are somehow not appropriate here.

I would suggest to him that there's an [5] insufficiency of evidence, a due process violation, Jackson versus Virginia. It just so happens that an insufficiency of evidence is a basis for this motion under the Virginia rules, so there's a congruence there.

And with respect to other due process arguments that we're raising, those arise if Your Honor determines that the evidence in this case is sufficient. At that point, that interpretation of that evidence in this statute will make these statutes unconstitutional as a matter of due process.

So that's an anticipatory argument. It depends on what Your Honor does. The error will only come – if it comes at all – as a result of Your Honor's ruling on this motion.

Now, the first thing we have to look at here is not the jury verdict, or not even Your Honor's decisions on the motion to strike. This is essentially a de novo view, if you will, of whether the evidence matches the legal standard.

The legal standard as stated in Bell – there's no question about this, everyone agrees – it must be shown in a criminal negligence case that a homicide was not improbable under all the facts existing at the time [6] and

that the knowledge of such facts should have had an influence on the conduct of the offender.

So we have to look at the knowledge of Mr. Kelly and the evidentiary rule where the evidence leaves an indefinite – which of these several hypothesis are true or establishes only some finite probability in favor of one hypothesis, such evidence cannot amount to proof however great the probability may be. That's the Massey case quoted in our brief.

I prepared up here on this chart a timeline and analytically broke it down into three parts. From approximately noon to 4:00 o'clock, with the key element being from approximately 1:00 to 2:40, then from 4:00 to 7:30 and then back here two to four years earlier the incidents that were touched on in the Beachers testimony.

And it's necessary analytically to break these things down and analyze them because we don't want to mix apples with oranges. The evidence dealing with the 12:15 to 7:30 timeline comes essentially from Mr. Kelly's statement, which is in evidence as Commonwealth's Exhibit 15.

And I think there's some confusion, at least in my mind, from what they're saying in their memorandum, [7] they seem to be disallowing the evidence here. Well, this evidence was put in by them. It was not contradicted or confuted by any other witness.

And it certainly is not inherently implausible and the rule of evidence in law for undisputed positive testimony as stated in the Forbes case, also in our memorandum, the trier of fact must attribute the weight of the testimony and the credibility of the witnesses, but it may not arbitrarily

disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record.

A Court may not base its findings on a suspicion which is contrary to the undisputed positive testimony.

Let me remind the Court that in the Forbes case the undisputed positive testimony was by the fellow who was driving the car, concerning his own estimation of his physical condition and his fitness to drive and the conviction was reversed in that case.

Now what happened here is Mr. Kelly came home with the little children and his Seton kids – as he called them – the high school children – at approximately 12:40 and instructed his older children – [8] "I instructed my older kids to get everyone in the house" while he went back to pick up his other daughter.

He returned approximately 1:00 to 1:10. What did he know at that point in time? From this statement – and there is no other evidence on that issue, his state of mind, his knowledge – he knew at that time that he had instructed those children, the older ones, to take the younger ones in the house.

He comes back in the house and he's there from 1:10 to 2:40. One of the next things he did – and I'll quote – "we get lunch on and I assumed Francis was taking her nap, which was normal for early afternoon." Once again a statement of his state of mind and his knowledge.

He was making an assumption about where that little girl was based on what was the normal procedure in the family. It's certainly not contradictory of common experience

that a child of twenty-one months would be sleeping between 12:00 and 2:00 or 3:00 in the afternoon.

And Dr. Frances Foster, the Commonwealth's own expert, said that during this period of time a child of that age would need to sleep.

So we certainly can't say that that statement of his state of mind was in any way contradicted or [9] inherently implausible.

Now, he stayed home between 1:00 and 2:40 doing various things. And I've drawn two lines on this chart – yellow lines – which represent what I think is a fair statement of what the medical examiner said about the death.

The child could have lived for an hour and a half to two hours or so. And guessing that he came back somewhere around 12:40, it takes you to between 2:10 and 3:00. And you notice how that brackets the time at which Mr. Kelly left. He left at 2:40.

And what is the reasonable inference, based on what we already have here, as to what his state of mind was when he left. Well, at 2:40, Francis was still up in her crib sleeping. Common experience would tell you she would still be sleeping.

So when he left at that point of time, he believed – and reasonably so – that Francis had been taken out of the van, she had been put to bed and she was still sleeping and off he went. By 3:00 Francis had passed on. He returned at 4:00.

Let's stop right there, 12:15 to 4:00. All of the evidence dealing with his state of mind was right [10] here. All of

this uncontradicted, all of it is reasonable, all of it is supported by common experience and even by the expert testimony of the witnesses put on by the Commonwealth.

So I submit that at this point, from 12:15 to 4:00 and you attempt to meet the Bells standard, knowledge that a homicide was not improbable under all the facts and circumstances existing at the time, the answer has to be arithmetically zero. And I don't intend to deface this chart, but I would put a big blank zero there (indicating).

Now we go to the second period, 4:00 to 7:00. I haven't put any specific time lines in there or specific facts, just this blue to indicate that what the Commonwealth is trying to do is to take Mr. Kelly's actions here (indicating) and to impute backwards in time into the red zone, the critical zone, the element of culpable knowledge and reckless indifference so as to effectuate conviction based on the effect that occurred somewhere between 2:10 and 3:00.

All right. Let's take that for the most that it's worth. Let's forget the application of the Ellis case to this, which would say that this amounts to [11] inadvertence and inattention, this amounts to a failure to monitor the child. And that is not by itself sufficient for criminal liability.

Let's assume that at some point between 4:00 and 7:30 p.m. Mr. Kelly demonstrated indifference – he wasn't paying attention where Francis was – and that someone who wasn't paying attention during that period of time or for that length of time would actually be acting in a reckless manner and potentially endangering the child if there was a danger.

The problem is criminal negligence is a temporally and logically defined crime. We start with the knowledge. We go from the knowledge to the reckless behavior, in which the defendant engages in the face of the knowledge, and the result thereof is the injury.

We have cause and we have effect. And anywhere on this planet cause precedes effect, effect does not precede cause. Yet the argument that the prosecution is making here is precisely that cause can in fact postdate effect.

And that's why this blue line (indicating) goes in reverse. We're reversing cause and effect. I take it that's a logical impossibility. I take it it's a [12] metaphysical impossibility. It's certainly a legal impossibility. So we can strike here (indicating) with a red arrow the attempt to impute back in time.

The third box is the testimony of the Beacher sisters, Erin and Amber. And we see another blue arrow coming up into the critical red zone because this is another attempt to impute knowledge to Mr. Kelly on the basis of theory of notice.

At least this does not have the demerit of attempting to reverse cause and effect. So at least in principle this could be done. In practice it fails because of the large question mark here (indicating).

The rule with respect to application of one of these notice theories is substantial similarity. Whether they were under the civil law or the criminal law, that's essentially what they are saying.

This set of circumstances here (indicating) has to be roughly paralleled to this set of circumstances here (indicating). Was it?

In the first place it didn't meet this Court's foundational requirements for probative value. You recall what the Court said both on the motion in limine by the defense and during the trial.

[13] In the motion in limine the Court said they had to show specific incidents where a child had been left in the car unattended by Kevin Kelly. There had to be a connection between Kevin Kelly in both of these sets of incidents.

Did they do that? I'm going to come to that. The answer is no.

The second and I think the more important one is dealing with the knowledge because knowledge in a criminal negligence case is knowledge of probable harm. This was brought up at the trial.

Your Honor's understanding of the representation of the Commonwealth was that Erin Beacher was going to testify that she went up to the door of Kevin Kelly's after she saw the child in the van and said, "If this continues, someone is going to die," or words to that effect.

And in fact, she did not do that. She said that to some friend of hers, but she didn't say it to Kevin Kelly. And I as [sic] recall Your Honor admonished her not to speak – did not allow that testimony.

So at this level, the Beachers' testimony doesn't meet the Court's previous order. And the Court's [14] previous orders were orders sounding in probative value.

We're not questioning the admissibility of that testimony. All sorts of testimony is admissible in a Court that has no probative value after you hear it. It had no probative

value because Your Honor defined what the elements of probative value were going to be.

But the second level here is if you're going to talk about substantial similarity, you have to talk about similarity. And if you're going to talk about similarity, you have to talk about a specific set of facts. And we know essentially next to nothing about what happened with respect to those incidents.

I'm just going to go down a couple of lines here (indicating). The material facts which are not established – I could carry this on for an hour. Which of the Kelly's children were in the van? We don't know.

By whom, why and for how long were in the van? We don't know. Did they come to be in the van as a result of accidents or negligence? We don't know. Were the van's doors and windows closed and locked or open? Well, we think they were open, but again we don't know.

How long were the children in the van? We don't know. Were conditions in the van potentially [15] dangerous? We don't know. Were the children crying because of physical distress brought on by a dangerous condition or for some benign reason simply because they were strapped in a car seat? We don't know.

Was someone in the Kelly home looking out the window monitoring these children? We don't know. Did Kevin Kelly ever acknowledge that the children's presence in the van was an accident? We don't know.

Did anyone warn Kevin Kelly that the children were in danger of being alone in the van? Well, neither of the Beacher sisters did, including Erin Beacher. So as to that, we don't know.

We know precious little about this. We do know, however, that there are certain facts that cannot possibly be inferred to in that testimony simply because of the rules stated in Massey.

We don't know that there was no valid reason for the children to be in the van. We don't know that they were left at all in the sense that someone wasn't monitoring them.

We don't know whether it was an accident, whether it was negligence, whether it was intentional. And we certainly don't know whether Kevin Kelly was [16] responsible for those children being in the van. All we know was he was in the home.

Of course the third point is exculpatory hypothesis. Let's take a look at the exculpatory hypothesis with respect to the Beacher testimony that essentially sinks this.

You remember Mr. McIvor testified that when he came upon the van he thought the little girl was sleeping because that's what people do. He knew that people sometimes had their children in cars sleeping.

It's a rather common experience in suburbia. I think probably everyone who has children may have seen it or done it at one time or another. It's usually very benign because someone is watching that child.

They don't want the child to wake up and be disturbed. They leave the child in the car to sleep, watching the child and they'll come and get the child as soon as she or he wakes up.

We also know from the evidence whose van was it. It was Mrs. Kelly's van. So on the basis of those two facts alone, besides common experience, what exculpatory explanation can we have for everything the Beachers saw?

[17] Mrs. Kelly drove home in the van. She had one of the little children with her. The child was asleep. It was approximately nap time. She didn't want to wake up the child and derange the child for the rest of the day.

She went into the house and did whatever she was doing for a few moments watching out the window or out the door to be sure that the child was not awake. The doors of the van were open. The windows were open because the Beachers heard the child cry when the child finally woke up.

The Beachers go to the door and Mr. Kelly comes to the door. The Beachers say the child's in the car and he says thank you. Why does he say thank you? Is he acknowledging that there's an accident or criminal negligence? No, I know it. Thank you. I know that. I'm going to go and get her now. I wasn't surprised at what you told me, but thank you anyway for your concern.

Now, that's an exculpatory hypothesis, which this evidence does not exclude. Ergo, this is not notice.

Now, I only want to make one more point with respect to the Beachers testimony. If it's notice, if this nothing that we have here (indicating) – this large zero is notice – then these statutes are [18] unconstitutionally vague because no person in his right mind could know on this day that two or four years earlier, based on what we've seen from the Beachers testimony, he could be guilty of

criminal negligence because of something he did today. It's inconceivable.

And not only is that inconceivable, but the other side of that coin is the conceivable part that it's a dangerous one. It opens up the possibility for the prosecutors or the juries, depending on essentially capricious views of the situation, can convict essentially anyone they want based on his entire life.

So I leave it there. The final point I would make is on the constitutional questions, this issue, the issue on wilfulness, does not arise unless Your Honor decides that the evidence is sufficient. It's Your Honor's responsibility to look into that question.

I'm going to believe that we'll never get to those due process issues because on the basis of this showing and what appears in the motion, the papers on both sides, there can be no question that this case does not satisfy either the Bell standard as a matter of legality or the Massey/Bishop or whatever you take any of those evidentiary cases as a matter of evidence.

[19] And therefore the verdicts must be set aside and judgments of acquittal entered.

Thank you, Your Honor.

THE COURT: Ms. Sylvester?

MS. SYLVESTER: Thank you, Your Honor. May it please the Court.

I wish to remind the Court that the standard here is totality of all the evidence. And despite the fact that counsel would have us believe the only evidence in this

case was a handwritten statement by the defendant, there was ample evidence in this case including the defendant's statement to Lieutenant Clovois (ph), "I told Anthony to take the children from the car."

Now, counsel would have you question that in a footnote. I'd suggest to the Court at this point in time it's not what he wants the evidence to show, it's what the evidence actually showed.

The Bell case that counsel sites I suggest to the Court is not being totally forthcoming with the Court because he eliminates the second part of that potential element the Commonwealth could prove.

It's not only that a homicide was not improbable under all the facts existing at the time and [20] that his knowledge of such facts should have influenced his conduct, or that a reasonable person would have known as much and modified his behavior.

I would suggest to the Court on page six of his own lengthy voluminous motion he recognizes that that's the second prong that the Commonwealth can look at. And that's what the Commonwealth relied on.

You know what, Judge, even the defense recognized that. Page 123 in the transcript attached to his own argument, Mr. Boyce; "Are you referring to the knowledge that a baby might die if left in the van?" The Court; "Yes." Mr. Boyce; "I think everybody knows that. We'll stipulate that – you know, that sort of – he's charged with – that's sort of common knowledge."

Well, it is common knowledge that if you leave a baby in a hot van, they're going to die. He tells you this is common suburbia practice? I suggest to the Court if that's

the case, there's a whole lot of criminal activity not being charged.

No one was watching Francis Kelly. He wants you to ignore the seven hours. He doesn't get it and neither does Mr. Kelly get it yet. For seven hours no one knew where she was.

[21] The man, under the Vaughan case, who was responsible and has a legal duty for her care didn't know where she was. The man, who when he returned with only six children in his car didn't know that she was left behind, is charged with the duty of care for that child.

And that's what the evidence showed. And under the reasonable person standard in Bell, the Commonwealth had ample evidence to show that.

Counsel wants you to focus only on that written statement. There was evidence that Mr. Kelly was well aware his delegation to Anthony was not proper. The Court didn't allow that in in [sic] case in chief. It came in in sentencing.

And the Court didn't allow it in the case in chief because they didn't want the jury to know that six weeks earlier a police officer stopped Mr. Kelly and told him Anthony's not the one responsible here. And he had a discussion with him about his parental legal duties.

And now to come before you and say in this brief that there was no knowledge to Mr. Kelly that his children were inadequate caretakers is inappropriate, misleading and somewhat fraudulent I'd suggest to the Court.

[22] Counsel sites Ellis to talk about this timeline. Ellis is completely distinguishable. As the Commonwealth's

response indicates, that was fifteen minutes that mother had left those children alone, not seven hours. And under the Hope case, you can consider post crime behavior to show consciousness of guilt.

I would suggest to the Court the fact that he didn't inquire as to her whereabouts for seven hours is important evidence in this case.

Counsel wants you to rely on mere medical speculation as to how long Francis would have lived. No one knows that to a medical certainty. They know to a medical certainty she died of hyperthermia. They know to a medical certainty what Dr. Foster told you minimal requirements for care are for a twenty-one month old child.

Three to four diaper changes, two to three diapers changes I recall, a certain amount of fluids every hour, especially at night with the heat and the humidity, two meals and yes a nap.

None of those were provided. Not just the nap. So what he thinks she's taking a nap. He didn't ask if she was. He didn't ask if she was changed. He didn't [23] ask if she was fed. He didn't ask if she had her fluids. He didn't ask if she was alive because he didn't think about it for seven hours.

He was too busy busying himself with tasks around the house and leaving the chore of raising his children with his other children, never once inquiring as to her whereabouts. And he testified to that on sentencing that he never did ask.

I would suggest to the Court further that under the Conrad case the Commonwealth was held to the objective

awareness standard to prove involuntary manslaughter. And that's exactly what the Beacher testimony did.

Counsel doesn't want to read your entire ruling. I would suggest to the Court that the transcript dated October 8th, 2002, on page 6 of that transcript, lines six through ten, the Court said "However evidence that shows a nexus between children being left unsupervised in a car and the defendant being made aware of it, the Court is going to allow the evidence to be considered by the jury on a witness by witness basis."

It wasn't just that he had to be the one that left the kids in the car, but that he had to be made aware [24] of the fact that it was dangerous to do and that had done so in the past. Three times the Beacher girls found children crying in the vehicle.

Counsel wants to assume a lot of facts, that the windows might have been down because they could hear them crying. We don't know. We don't know if that's the case or not. Nor were they ever asked, as I recall. But the point of the matter was three times those girls went up to him to tell him.

And if you recall the testimony even in sentencing when Mr. Brown routinely would bring children back, Mr. Kelly's habit was just to say thank you. Even when his children were left unattended and wandering around the neighborhood in diapers, that was his response.

That's not telling that he knew they were out there. And if did know they were out there, that even makes our case stronger. That even makes our case stronger that he knew he was leaving babies in a car for any length of time

to the point where they would wake up and they were scared. They wake up and they're crying.

So you can't have it both ways, counsel. It has to be one or the other. Either he knew or he didn't know and he was made aware. But it goes to this, Your [25] Honor, three times he was made aware that kids were left in a vehicle.

Ample other evidence of his lack of parenting skills was brought forth by the Commonwealth and in the motion in limine not allowed.

But I would suggest to the Court the totality of the evidence presented to this jury gave a clear picture that this man was an inattentive parent.

And I would suggest to the Court counsel try as he might to put forth to you the evidence as he wished it had been argued, as he wished it had come out, is not sufficient for a motion to set aside the verdicts.

The standard's extremely high, Your Honor. We've quoted that in our response. I would also ask the Court to incorporate all of our other motions and memorandums of law in this case.

But I would suggest to the Court under the Clark case the motion to set aside the verdicts has to be based on whether or not a plain deviation from right injustice is proven. There's been no plain deviation of right injustice in this case. There was ample evidence.

I would ask the Court to deny this motion. I would further ask the Court this argument about depending [26] on what you do will bring forth the other arguments, that's not appropriate for a motion to set aside the verdicts,

which the rules of the Court limit to sufficiency of the evidence and trial court rulings thereof.

Thank you.

THE COURT: Response.

MR. VIEIRA: Do we have a little bit of time, Your Honor?

THE COURT: You do.

MR. VIEIRA: I mean, considering that I've been charged with fraud, I think it might be appropriate for me to just say a few things in response to what's been said here.

Number one, what was said at sentencing hearings, in cafeterias or heaven knows where is irrelevant to what was in front of that jury. That jury is not to construe a verdict on the basis of who knows what opinions. They're to construe on the base of the law and the facts presented to them.

So all of these discussions are beside the point.

With respect to this question of Anthony and [27] Lieutenant Clovois's statement, we know what Mr. Kelly said in his statement. We know what Lieutenant Clovois said. The point is they don't contradict each other. They are consistent if you read them in the sense of the footnote in our memorandum.

And in any event, there was no testimony before this jury that Anthony or any of the other teenage children were irresponsible, imprudent, whatever word you want to use. The jury knew nothing about that.

Now, secondly, this question of Mr. Kelly and what he knew. Mr. Kelly made an assumption during that period from 1:00 to 2:40. He made an assumption based upon practices of the family based upon what we all know to be true.

Even under the reasonable person standard, what would a reasonable person in those circumstances believe? What would a reasonable person in those circumstances do? I'm not trying to get away with that. I bring it out in my bloody memorandum.

What would a reasonable person under those circumstances do? Just what he did. He's told the teenage children to take the little ones into the house. he goes off on some other errand. He comes back at a time [28] when the little one should be sleeping.

And what is he going to assume under the basis of family practice? What would I assume? What would you assume? She's there sleeping. He has no reason to believe anything else.

By the time he leaves at 2:40 – and of course he hasn't expected to see her from 1:00 to 2:40 because she's sleeping – he is still making that assumption, which is a reasonable assumption.

It was a tragic assumption. It was perhaps a misguided assumption. We're not here to play God. We're here to construe the facts according to the law. And the law requires knowledge of a dangerous situation. And if he has a reasonable assumption that excludes that, that's the end of the discussion.

Now, the Ellis case, I do want to mention that. Remember what happened in the Ellis case. Mrs. Ellis leaves

the children, one is two and one is four, in the apartment alone. She knows that there's no custodial care for them at all.

She goes off to socialize with some friends in another building. She lights a cigarette in the gas stove and leaves the gas stove on. The apartment catches on [29] fire.

Why was she gone for only fifteen or twenty or thirty minutes? I think thirty minutes was closer. Why was she gone for thirty minutes? Because the house was burning down. It was a fire alarm.

Why was Francis Kelly in the van from 12:40 or so until let's say 3:00 when she finally perished? Because nobody knew. There was no alarm going off. It was essentially an occult occurrence.

There had been some kind of accident or misunderstanding among the children. The other two little ones had been brought in. She wasn't. They probably saw the other two and assumed she was there. One of those terrible mixups. We know those things happen.

Finally – I think and I hope – well, not quite. There's two things I want to mention.

First is the medical speculation. Yes, Medical science or forensic science is not an exact science and they have to make some estimates here and there. But that was the testimony in front of the jury.

You don't exclude medical testimony from the jury simply because it's an estimate. And you are not allowed to speculate outside of that testimony because [30] that's the only testimony there is.

If you were to speculate, why don't we say it was one minute until she died. I mean, that argument is totally out of bounds from the point of view of evidentiary procedure.

Now, as far as the consciousness of guilt, what he did from 4:00 to 7:00 was consciousness of guilt? The Bishop case, as recited in our memorandum, points out that you can't use suspicious behavior subsequent to the supposed commission of a crime to impute backwards guilt to that defendant, such as lying.

What was he doing? It was the inadvertedness, inattention of Ellis.

The final point, with respect to Your Honor's ruling, I'm glad Ms. Sylvester quoted that. The nexus language, unsupervised. The child was to be unsupervised. That was the basis.

Do we know that that child was unsupervised? Can supervision of a child in a car seat sleeping be done at a distance? Do the laws of physics preclude that? Is that totally unreasonable to believe?

We know nothing about the supervision of those children in the Beachers testimony. Nada. Zero. And [31] that is the problem. If you know nothing, you cannot establish similarity, substantial or otherwise.

And once again, I ask Your Honor to set aside the verdicts.

THE COURT: Well, contrary to what some may believe, this Court is not in the business of playing God. It's simply to ask you to try to obtain the ends of justice from the facts and circumstances presented.

In this case, it's clear to the Court that the jury had the opportunity to consider the facts of the case from the appropriate legal standards.

Typically the Court instructed the jury among other things of the Commonwealth's duty to prove Mr. Kelly's guilt beyond a reasonable doubt.

The motion to set aside the verdicts is not an appropriate mechanism to challenge a determination of the jury and interpretation of the facts by the jury.

The theory today is inconsistent with the trial theory. The trial theory was fact based and the Court's view is that the jury and the Court considered same in the context of both guilt and innocence and sentencing.

I would suggest that had this view been [32] articulated at the trial, the Court's view is that it clearly would not have affected the determination contrary to what the jury decided as far as guilt or innocence.

I would suggest to you all that it probably would have impacted the jury's determination as to the appropriate sentence in this case. I believe that under the circumstances in this case, the jury had a lot of compassion for Mr. Kelly in it's determination of the appropriate sentence in this case.

And I know for a fact that this Court had a lot of compassion for Mr. Kelly as far as the appropriate sentence in this case.

Under the appropriate legal standards, there was no plain deviation of right injustice in the circumstances of this case. The motion to set aside the verdicts is denied.

* * *

In the

COURT OF APPEALS OF VIRGINIA

Record No. 0762-03-4

KEVIN CHRISTOPHER KELLY,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE,

PETITION FOR APPEAL

EDWIN VIEIRA, JR., ESQ.
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Manassas, Virginia 20112
(703) 791-6780

Counsel for Kevin C. Kelly

[2] * * *

QUESTION PRESENTED[1]

Did the Circuit Court err in denying Kevin Kelly's motions to strike, and his motion to set aside the verdicts and enter judgments of acquittal, and should this Court now reverse the Circuit Court and order the verdicts to be set aside (and with them the Sentencing Order), and judgments of acquittal to be entered, because the Commonwealth failed to prove beyond a reasonable doubt that Kevin Kelly: (i) was aware, from his knowledge of existing facts and circumstances, that his conduct would probably cause injury to Frances Kelly, and (ii) proceeded consciously with recklessness or indifference to the consequences of his behavior; and therefore the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and of the United States?[2] Specifically –

A. For the period between 12:50 to 4:00 pm (approximately one hour after Frances Kelly died) on the day in question, does the record conclusively establish that Kevin Kelly reasonably believed that she was either in his older children's care or taking a nap, that reasonable exculpatory hypotheses justify his conduct, and that (in any event) his conduct did not exceed in culpability the "inattention and inadvertence" held not "subject to criminal

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[1] This issue was preserved in the Circuit Court in Kevin Kelly's motions to strike, Tr of 19 Nov. 02, at 180-88; in his *Motion to Set Aside the Verdicts and Enter Judgments of Acquittal* and *Memorandum of Points and Authorities* incorporated therein, R2 at 227-50 and R3 at 1-116; and in the oral argument on that motion, Tr of 6 Mar. 03.

[2] Hereinafter, references to the invalidity of and necessity to set aside the verdicts should be taken to include the Sentencing Order (which depends upon them), and the Circuit Court's rulings on the motions to strike and to set aside (which allowed and upheld them).

penalty" in *Ellis v. Commonwealth*, 29 Va. App. 548, 555-56, 513 S.E.2d 453, 456-57 [3] (1999), and therefore to infer criminal negligence from his behavior before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

B. For the period from 4:00 until about 7:30 pm on that day, does the record conclusively establish that, even if Kevin Kelly's behavior cannot be justified by reasonable exculpatory hypotheses and exceeded the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis* (which he denies), nonetheless it could not have contributed to Frances Kelly's death; and therefore to infer from his behavior after 4:00 pm that he was criminally negligent before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

C. Does the record conclusively establish that the testimony of Erin Beacher and Amber Beacher with respect to events long prior to the day in question failed to describe those events in detail sufficient to establish what actually happened, failed to establish that those events were substantially similar to the incident in issue, and failed to exclude reasonable exculpatory hypotheses; and therefore the use of their testimony to impute "notice" to Kevin Kelly was irrational, arbitrary, and unconstitutional, and renders both charges void for vagueness as applied?

The sole relief sought under this QUESTION PRESENTED is for the verdict to be set aside, and judgments of acquittal entered. Kevin Kelly seeks no new trial, and waives any claim thereto.

* * *

In the

COURT OF APPEALS OF VIRGINIA

Record No. 0762-03-4

KEVIN CHRISTOPHER KELLY,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA

APPELLEE,

OPENING BRIEF OF APPELLANT

EDWIN VIEIRA, JR., ESQ.
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Counsel for Kevin C. Kelly

[2] QUESTION PRESENTED[1]

Did the Circuit Court err in denying Kevin Kelly's motions to strike, and his motion to set aside the verdicts and enter judgments of acquittal, and should this Court now reverse the Circuit Court and order the verdicts to be set aside (and with them the Sentencing Order), and judgments of acquittal to be entered, because the Commonwealth failed to prove beyond a reasonable doubt that Kevin Kelly: (i) was aware, from his knowledge of existing facts and circumstances, that his conduct would probably cause injury to Frances Kelly, and (ii) proceeded consciously with recklessness or indifference to the consequences of his behavior; and therefore the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and of the United States?[2] Specifically –

A. For the period between 12:50 to 4:00 pm (approximately one hour after Frances Kelly died) on the day in question, does the record conclusively establish that Kevin Kelly reasonably believed that she was either in his older children's care or taking a nap, that reasonable exculpatory hypotheses justify his conduct, and that (in any event) his conduct did not exceed in culpability the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis v. Commonwealth*, 29 Va. App. 548, 555-57, 513 S.E.2d 453, 456-58 (1999), and therefore to

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[1] This issue was preserved below in Kevin Kelly's motions to strike and his motion to set aside the verdicts and enter judgments of acquittal. App. at 191-99, 222-55, 261-30, 377-408.

[2] Hereinafter, references to the invalidity of and necessity to set aside the verdicts should be taken to include reversal of the Sentencing Order (which depends upon them), and the Circuit Court's rulings on the motions to strike and to set aside (which allowed and upheld them).

infer criminal negligence from his behavior before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

B. For the period from 4:00 until about 7:30 pm on that day, does the record conclusively establish that, even if Kevin Kelly's behavior cannot be justified by reasonable [3] exculpatory hypotheses and exceeded the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis* (which he denies), nonetheless it could not have contributed to Frances Kelly's death; and therefore to infer from his behavior after 4:00 pm that he was criminally negligent before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

C. With respect to events long prior to the day in question, does the record conclusively establish that the testimony of Erin Beacher and Amber Beacher failed to describe those events in detail sufficient to establish what actually happened, failed to establish that those events were substantially similar to the incident in issue, and failed to exclude reasonable exculpatory hypotheses; and therefore the use of their testimony to impute "notice" to Kevin Kelly was irrational, arbitrary, and unconstitutional, and renders both charges void for vagueness as applied?

The sole relief sought under this QUESTION PRESENTED is for the verdict to be set aside, and judgments of acquittal entered. Kevin Kelly seeks no new trial, and waives any claim thereto.

* * *

In the

COURT OF APPEALS OF VIRGINIA

Record No. 0762-03-4

KEVIN CHRISTOPHER KELLY,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA

APPELLEE.

REPLY BRIEF OF APPELLANT

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Counsel for Kevin C. Kelly

[1] REPLY BRIEF OF APPELLANT

Kevin Kelly hereby replies to the Brief of the Commonwealth ("BC").

ARGUMENT

1. Contrary to BC at 12 n.1 and 26 n.4, all the issues raised in this appeal were preserved. Insufficiency of evidence arose twice in the motions to strike. Appendix ("App.") at 191-99. As convictions on insufficient evidence deny due process, that issue was implicit in those motions. *See Commonwealth v. Hudson*, 265 Va. 505, 512, 578 S.E.2d 781, 785 (2003). The motion to set aside the verdicts explicitly raised both insufficiency of evidence and violations of due process. App at 222-408. This was timely. *See Pine* v. *Commonwealth*, 121 Va. 812, 820-21, 93 S.E. 652, 654 (1917). Moreover, a motion to strike is not a prerequisite to a motion to set aside. *McGee* v. *Commonwealth*, 4 Va. App. 317, 321, 357 S.E.2d 738, 739-40 (1987). When the Circuit Court denied the latter motion, no more had to be done to preserve the issues. *See Johnson* v. *Commonwealth*, 20 Va. App. 547, 552-53, 458 S.E.2d 599, 601-02 (1995).

* * *

[6] * * *

9. Contrary to BC at 15-16 and 26-27, Kevin Kelly contends that the Beachers' testimony was nonprobative, not "wholly irrelevant". Its ostensible purpose was to prove "notice", and thereby supply an element of the offense. Every element of the offense must be proved beyond a reasonable doubt. Proof of "notice" required proof of "substantial similarity" between the prior events and the incident *sub judice*. But no such similarity was shown at trial, because "[t]oo many essentials in the chain of circumstances [were] lacking". *Whitlow* v. *Commonwealth*, 198 Va. 165, 168, 93 S.E.2d 127, 129 (1956). "[A]ny such inference would have been purely speculative because no

facts were proved that would have supported such an inference." *Hill* v. *Commonwealth*, 17 Va. App. 480, 485, 438 S.E.2d 296, 299 (1993). *See* BA at 7-9, 26-31.

An inference of "substantial similarity" required proof that, on the prior occasions, a little [7] child had been "left" in the closed-up and locked van, as the result of an instruction from Kevin Kelly to an older child which was not carried out unbeknownst to Kevin Kelly, resulting in the little child's exposure to danger from heat. In fact: Contrary to BC at 11, no evidence exists that the van was closed-up and locked. On one occasion, Amber Beacher "went over and checked on the kid", and on each occasion the Beachers heard a child crying – all consistent with the van's doors or windows being open. *See* BA at 8.

No evidence exists that Kevin Kelly ever instructed some older child to remove a younger one from the van, but that (unbeknownst to him) his instructions were not carried out. *This alone destroys the case for "substantial similarity", because the charge is that Kevin Kelly was reckless initially in directing Anthony (or all the teenagers) to take Frances from the van. As the prior events cannot be shown to have involved this element, they cannot be "notice" to him.* Even were the inference that Kevin Kelly himself "left" the children in the van on the prior occasions, "notice" would nevertheless fail – because, on the day *sub judice*, Kevin Kelly did not leave Francis [sic] *in* the van, but instructed Anthony (or all the teenagers) to take her *out*. Supposed "notice" of his own potential failing as to one course of conduct is not "notice" of anyone else's *unknown* failing as to a *different* course of conduct.

That any child was "left" in the van on the prior occasions cannot be inferred beyond a reasonable doubt.

See BA at 8 & n.9. No evidence explains how or why any child came to be alone in the van. But undisputable is that Kevin Kelly was in the house. So, if a jury could infer that any child was "left" in the van, it could equally infer that no child was "left", because Kevin Kelly knew a child was there on each occasion. Neither inference can be drawn beyond a reasonable doubt. Similarly, if a jury could infer that Kevin Kelly had something to do with the children's being in the van because he was in the house, it could equally infer that he had nothing to do with it, because the van was his wife's. *See* App at 163. Neither inference can be drawn [8] beyond a reasonable doubt. And that on two occasions Kevin Kelly said "Thank you" to Erin Beacher cannot prove beyond a reasonable doubt "that the child's presence was unintended and needed to be rectified". *Pace* BC at 26-27. If a jury could infer that, it equally could infer an exculpatory explanation. *See, e.g.*, BA at 30.

Danger to the children on the prior occasions cannot be inferred beyond a reasonable doubt, either. No evidence exists as to what the temperature *in the van* was on any of those days, or how long any child had been and might have remained there. One day was only "warm out, it wasn't too hot" – from which evidence the absence of danger is more reasonable an inference than its opposite. *See* BA at 8. That the Beachers heard children crying on each occasion indicates that the van was always open – from which an inference of lack of danger is at least as if not more reasonable than its opposite. And, contrary to BC at 26, the Beachers never testified that any child was "sufficiently distressed to cry out", only that they "heard a slight crying" or "heard a kid cry" – from which, if any child's physical discomfort was a possible inference, so too was (say) the child's mere displeasure at being alone and

restrained. *See* BA at 8. Neither inference can be drawn beyond a reasonable doubt.

Thus, from the Beachers' testimony it is impossible for anyone, beyond a reasonable doubt, "to regard these incidents as evidence that there was a recurring pattern of negligence on the part of Kelly" that paralleled the events on the fatal day. *Pace* BC at 26. *See* the authorities collected *ante*, at 2. Indeed, most plausible is the exculpatory hypothesis which the Commonwealth excoriates as an "empty exercise[ ] in conjecture and rank speculation" (BC at 16), but which finds support in the evidence: namely, that the van was Mary Kelly's; that, as other suburbanites do, she sometimes allowed a child to sleep in the van while monitoring the situation from inside the house; and that, on the occasions the Beachers observed, Kevin Kelly knew what was going on, whereas they did not. *See* BA at 30 (and *mutatis mutandis* if Kevin [9] Kelly were presumed to be the van's driver). This hypothesis being "more favorable to the accused", and not "untenable", it "should be adopted". *Williams* v. *Commonwealth*, 193 Va. 764, 772, 71 S.E.2d 73, 77 (1952). Otherwise, a due process issue arises. *See* BA at 31-33.

10. The Commonwealth argues that Kevin Kelly's demonstration that his convictions impose strict liability "counts for little" in light of *Esteban* v. *Commonwealth*, 2003 Va. App. LEXIS 106 (31 Oct. 2003). BC at 21-22. Yet that the Legislature can declare certain especially dangerous conduct a strict-liability offense does not mean that prosecutors can obtain convictions for *other* crimes on a strict-liability basis. And as common-law criminal negligence and § 18.2-371.1(B) have never been held to be, or enforced as, strict-liability offenses elsewhere, they cannot be here. Contrary to BC at 22-25, none of the criminal-negligence

cases arising out of hunting accidents imposed strict liability. Instead, all of them adjudged the hunters at fault for failure to use due care: *Gooden* v. *Commonwealth*, 226 Va. 565, 573, 311 S.E.2d 780, 785 (1984) ("either failed to look, or * * * failed to do so with requisite caution"); *Lawson* v. *Commonwealth*, 35 Va. App. 610, 620, 547 S.E.2d 513, 518 (2001) (failed "to properly identify his target"); *Cable* v. *Commonwealth*, 243 Va. 236, 241, 415 S.E.2d 218, 221 (1992) (failed "to identify his target"). Furthermore, no parallel can be drawn between hunting, where every hunter knows that he is firing bullets for the very purpose of killing his quarry, and that an errant shot can kill or maim anyone it strikes, and a father's asking a teenager to take a little one from the family vehicle into their house a few yards away.

* * *

In the

COURT OF APPEALS OF VIRGINIA

Record No. 0762-03-4

KEVIN CHRISTOPHER KELLY,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

APPELLANT KEVIN C. KELLY'S PETITION FOR REHEARING *EN BANC*

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Counsel for Kevin C. Kelly

[1] * * *

ASSIGNMENTS OF ERROR IN THE PANEL'S DECISION THAT COMPEL REHEARING *EN BANC*

The Panel's opinion suffers from numerous "'flagrant error[s] or mistake[s]'" that ought to "be corrected through the en banc hearing process" *Commonwealth v. Burns*, 240 Va. 171, 174, 395 S.E.2d 456, 457 (1990). Specifically –

I. The Panel's opinion irreconcilably conflicts with numerous prior decisions of this Court and of the Supreme Court of Virginia, thus subverting "traditional rules of decision, such as stare decisis". *Burns*, 240 Va. at 174, 395 S.E.2d at 457. To wit:

A. The panel (Opn at 4) erroneously denied that constitutional arguments arising out of the insufficiency of the evidence may be raised for the first time in a motion to set aside the verdicts. This is an unprecedented and indefensible misapplication of Rules 3A:15 and 5A:18, and numerous judicial precedents. *See post*, at 11-12.

B. The panel (Opn at 4) seems erroneously to deny that the insufficiency of certain witnesses' testimony may be raised in a motion to set aside without either a prior objection to its relevance at the time they testified or a motion to strike. This flies in the face of the record here and is a further unprecedented and indefensible misapplication of Rules 3A:15 and 5A:18. *See post*, at 12.

C. The Panel (Opn at 5) erroneously denied that, to establish [Kevin Kelly's] guilt beyond a reasonable doubt, the Commonwealth "must exclude every reasonable hypothesis except that of guilt", whether the evidence is circumstantial or direct. *See Stamper v. Commonwealth*, 220 [2] Va. 260, 272, 257 S.E.2d 808, 817 (1979). And even if reasonable hypotheses of innocence may be raised only with respect to circumstantial evidence, the Panel refused to recognize that the *only* direct evidence on the key facts in issue in this case (Kevin Kelly's written statement detailing his knowledge, state of mind, and conduct) *exculpates* him, and that all the remaining evidence *is* circumstantial and consistent with reasonable exculpatory hypotheses. *See post*, at 12-14.

D. As to the critical period between 12:00 noon and 4:00 pm on the day *sub judice*, the Panel (Opn at 5-8) failed to identify Kevin Kelly's conduct that allegedly met the standard for criminal negligence "that a homicide was not improbable under all of the facts existing at the time, and that the knowledge of such facts should have had an influence on [Kevin Kelly's] conduct". *Bell v. Commonwealth*, 170 Va. 597, 611, 195 S.E.2d 675, 681 (1938). The Panel further refused to mention, let alone follow, this Court's ruling that a parent's "inattention and inadvertence" and failure "satisfactorily [to] monitor her children" do *not* constitute criminal negligence, even though she knowingly left them unattended and negligently started a fire that endangered them – neither of which aggravating circumstances obtained here. *Ellis v. Commonwealth*, 29 Va. App. 548, 555-57, 513 S.E.2d 453, 456-58 (1999). *See post*, at 14-17.

E. The Panel (Opn at 7-8) refused even to mention: (1) that the *only* evidence of Kevin Kelly's knowledge, his state of mind, and the basis for his behavior during the critical period is his written statement, introduced by the Commonwealth as its own Exhibit 15, which *exculpates* him under the *Bell* test. (2) That the Commonwealth is bound by this direct testimony. *Beale v. Jones*, 210 Va. 519, 521, 171 S.E.2d 851, 853 (1970). And (3) that "'[t]he trier of fact * * * "may not arbitrarily disregard uncontradicted evidence of [an] unimpeached witness[ ] which is not inherently incredible and not inconsistent with facts in the record."'" *Forbes v. Commonwealth*, 27 Va. App. 304, 312, 498 S.E.2d 457, 460 (1998). *See post*, at 17-18.

F. The Panel's attempt to establish Kevin Kelly's guilty by reference to events that [3] occurred *after* Frances Kelly's death (Opn at 7-8) violated the laws of logical,

physical, and legal cause and effect. *See Jetton v. Commonwealth*, 2 Va. App. 557, 561, 347 S.E.2d 141, 144 (1986); *Bell*, 170 Va. at 611, 195 S.E. at 681; *Beale*, 210 Va. at 522, 171 S.E.2d at 853; *Dugroo v. Garrett*, 203 Va. 918, 920, 128 S.E.2d 303, 305 (1962); *Commercial Distributors v. Blankenship*, 240 Va. 382, 395, 397 S.E.2d 840, 847 (1990); *Leary v. United States*, 395 U.S. 6, 36 (1969). *See post*, at 18-21.

G. The Panel's attempt to establish Kevin Kelly's guilt by reference to certain events that occurred years before the incident *sub judice* failed even to mention, let alone to satisfy, the requirement that *substantial similarity* must be shown between the prior events and the one at issue. *Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 325-36, 237 S.E.2d 157, 160 (1977); *Spurlin v. Richardson*, 203 Va. 984, 989, 128 S.E.2d 273, 277 (1962); *Guill v. Commonwealth*, 255 Va. 134, 140, 495 S.E.2d 489, 492-93 (1998). *See post*, at 21-25.

II. As a result of the foregoing "'flagrant error[s] or mistake[s]'", the Panel's opinion has created a rule of strict liability, unprecedented in common-law or statutory criminal negligence, whereby a parent may be held criminally responsible for injury to a child he placed in the care of a third party, with no showing that the parent's original assignment of that care, or his continued belief that the child was safe as the result of that assignment, was "reckless" behavior. *See post*, at 25-27.

QUESTION PRESENTED TO THE PANEL[1]

Did the Circuit Court err in denying Kevin Kelly's motions to strike, and his motion to set aside the verdicts and enter judgments of acquittal, and should this Court now reverse the [4] Circuit Court and order the verdicts to be set aside (and with them the Sentencing Order), and judgments of acquittal to be entered, because the Commonwealth failed to prove beyond a reasonable doubt that Kevin Kelly: (i) was aware, from his knowledge of existing facts and circumstances, that his conduct would probably cause injury to Frances Kelly, and (ii) proceeded consciously with recklessness or indifference to the consequences of his behavior; and therefore the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and of the United States?[2] Specifically –

A. For the period between 12:50 to 4:00 pm (approximately one hour after Frances Kelly died) on the day in question, does the record conclusively establish that Kevin Kelly reasonably believed that she was either in his older children's care or taking a nap, that reasonable exculpatory hypotheses justify his conduct, and that (in any event) his conduct did not exceed in culpability the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis v. Commonwealth*, 29 Va. App. 548, 555-57, 513 S.E.2d 453, 456-58 (1999), and therefore to

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[1] This issue was preserved below in Kevin Kelly's motions to strike and his motion to set aside the verdicts and enter judgments of acquittal. Appendix submitted to the Panel ("App") at 191-99, 222-55, 261-360, 377-408.

[2] Hereinafter, references to the invalidity of and necessity to set aside the verdicts should be taken to include reversal of the Sentencing Order (which depends upon them), and the Circuit Court's rulings on the motions to strike and to set aside (which allowed and upheld them).

infer criminal negligence from his behavior before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

B. For the period from 4:00 until about 7:30 pm on that day, does the record conclusively establish that, even if Kevin Kelly's behavior cannot be justified by reasonable exculpatory hypotheses and exceeded the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis* (which he denies), nonetheless it could not have contributed to Frances Kelly's death; and therefore to infer from his behavior after 4:00 pm that he was criminally negligent before 4:00 pm is irrational, arbitrary, and unconstitutional? *And*,

C. With respect to events long prior to the day in question, does the record conclusively [5] establish that the testimony of Erin Beacher and Amber Beacher failed to describe those events in detail sufficient to establish what actually happened, failed to establish that those events were substantially similar to the incident in issue, and failed to exclude reasonable exculpatory hypotheses; and therefore the use of their testimony to impute "notice" to Kevin Kelly was irrational, arbitrary, and unconstitutional, and renders both charges void for vagueness as applied?

The sole relief sought under this QUESTION PRESENTED is for the verdicts to be set aside, and judgments of acquittal entered. Kevin Kelly seeks no new trial, and waives any claim thereto.

* * *

In the

SUPREME COURT OF VIRGINIA

Supreme Court Record No. 040643
(Court of Appeals Record No. 0762-03-4)

KEVIN CHRISTOPHER KELLY,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

PETITION FOR APPEAL

EDWIN VIEIRA, JR., ESQ.
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(703) 791-6780

Counsel for Kevin C. Kelly

[2] ASSIGNMENTS OF ERROR[3]

1. The Court of Appeals erred by denying that Rules 3A:15 and 5A:18 allow constitutional arguments arising out of insufficiency of the evidence to be raised (and preserved) by a motion to set aside, without a prior motion to strike on those grounds.

2. The Court of Appeals erred by denying that Rules 3A:15 and 5A:18 allow the insufficiency of witnesses' testimony to be raised (and preserved) by a motion to strike or a motion to set aside, without a prior objection to the testimony's relevance.

3. The Court of Appeals erred by denying that the commonwealth must exclude every reasonable hypothesis except that of guilt, whether the evidence is circumstantial or direct; that the only direct evidence on the controlling issues of Kevin Kelly's knowledge, state of mind, and conduct during the critical period from 12:00 noon to 2:40 pm on the day *sub judice* exculpates him; and that all the remaining evidence is both circumstantial and either nonprobative or consistent with exculpatory hypotheses.

4. The Court of Appeals erred in affirming the Circuit Court's denials of Kevin Kelly's motions to strike and to set aside the verdicts and enter judgments of acquittal,[4] because the Commonwealth failed to prove

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[3] ASSIGNMENTS Nos. 1, 2, 3 and 5 arose out of the Court of Appeals' decision. ASSIGNMENT No. 4 arose from the question presented to and erroneously decided by the Court of Appeals, which was preserved in Kevin Kelly's motions to strike and his motion to set aside the verdicts and enter judgments of acquittal. Tr of 19 Nov 02, at 180-88; R2 at 227-50 and R3 at 1-116; Tr of 6 Mar 03. *See* Rule 5:17(c).

[4] Herein, references to the invalidity of and necessity to set aside the verdicts should be taken to include the Circuit Court's Sentencing

(Continued on following page)

beyond a reasonable doubt that Kevin Kelly: (i) was aware, from his knowledge of existing facts and circumstances, that his conduct [3] would probably cause injury to Frances Kelly, and (ii) proceeded consciously with recklessness or indifference to the consequences of his behavior, as required by *Bell v. Commonwealth*, 170 Va. 597, 611-12, 195 S.E. 675, 681 (1938) ("*Bell*") – and therefore the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and of the United States. Specifically, the Court of Appeals erred because –

a. For the period between 12:50 to 4:00 pm (approximately one hour after Frances Kelly died) on the day in question, Kevin Kelly reasonably believed that she was either in his older children's care or taking a nap; reasonable exculpatory hypotheses justify his conduct; and his conduct did not exceed in culpability the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis v. Commonwealth*, 29 Va. App. 548, 555-57, 513 S.E.2d 453, 456-58 (1999) ("*Ellis*") – and therefore to infer criminal negligence from his behavior before 4:00 pm is irrational, arbitrary, and unconstitutional. *And*,

b. For the period from 4:00 until 7:30 pm on that day, even if Kevin Kelly's behavior cannot be justified by reasonable exculpatory hypotheses and exceeded the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis* (which he denies), nonetheless it could not have contributed to Frances Kelly's death – and therefore to infer from his behavior after 4:00 pm that he

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Order (which depends upon them) and rulings on the motions to strike and to set aside (which allowed and upheld them), and the Court of Appeals' judgment (which affirmed them).

was criminally negligent before 4:00 pm is irrational, arbitrary, and unconstitutional. *And*,

c. With respect to events long prior to the day in question, the testimony of Erin Beacher and Amber Beacher failed to describe those events in detail sufficient to establish what actually happened, to establish that those events were "substantially similar" to the [4] incident in issue, and to exclude reasonable exculpatory hypotheses – and therefore the use of their testimony to impute "notice" to Kevin Kelly was irrational, arbitrary, and unconstitutional, and renders both charges void for vagueness as applied.

5. In affirming Kevin Kelly's convictions notwithstanding that the evidence falls below the requirements of *Bell*, 170 Va. at 611-12, 195 S.E. at 681, the Court of Appeals erred by creating and applying a rule of strict liability unprecedented in Virginia's law of criminal negligence, which action contravenes Virginia law and the Due Process Clauses of the Constitutions of the United States, of Virginia, or of both.

QUESTIONS PRESENTED[5]

1. Do Rules 3A:15 and 5A:18 allow constitutional arguments arising out of the insufficiency of the evidence

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[5] Each QUESTION pertains to the ASSIGNMENT OF ERROR of similar number, and arose or was preserved as described for those ASSIGNMENTS. *Ante* note 3. Kevin Kelly maintains that the answers to all of these QUESTIONS are "Yes". The sole relief sought under these QUESTIONS is for the verdicts to be set aside, and judgments of acquittal entered. Kevin Kelly seeks no new trial, and waives any claim thereto.

to be raised (and preserved) by a motion to set aside, without a prior motion to strike on those grounds?

2. Do Rules 3A:15 and 5A:18 allow the insufficiency of witnesses' testimony to be raised (and preserved) by a motion to strike or a motion to set aside, without a prior objection to the testimony's relevance?

3. Must the Commonwealth exclude every reasonable hypothesis except that of guilt, whether the evidence is circumstantial or direct; did the only direct evidence on the controlling issues of Kevin Kelly's knowledge, state of mind, and conduct during the critical period from 12:00 noon to 2:40 pm on the day *sub judice* exculpate him; and was [5] all the remaining evidence both circumstantial and either nonprobative or consistent with exculpatory hypotheses?

4. Should this Court reverse the Court of Appeals and the Circuit Court, and order the verdicts to be set aside and judgments of acquittal to be entered, because the Commonwealth failed to prove beyond a reasonable doubt that Kevin Kelly: (i) was aware, from his knowledge of existing facts and circumstances, that his conduct would probably cause injury to Frances Kelly, and (ii) proceeded consciously with recklessness or indifference to the consequences of his behavior, as required by *Bell*, 170 Va. at 611-12, 195 S.E. at 681 – and therefore the verdicts contravene the Due Process Clauses of the Constitutions of Virginia and the United States? Specifically –

a. For the period between 12:50 to 4:00 pm (approximately one hour after Frances Kelly died) on the day in question, did Kevin Kelly reasonably believe that she was either in his older children's care or taking a

nap; do reasonable exculpatory hypotheses justify his conduct; and did his conduct not exceed in culpability the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis*, 29 Va. App. at 555-57, 513 S.E.2d at 456-58 – and therefore is it irrational, arbitrary, and unconstitutional to infer criminal negligence from his behavior before 4:00 pm? *And*,

b. For the period from 4:00 to 7:30 pm on that day, even if Kevin Kelly's conduct cannot be justified by reasonable exculpatory hypotheses and exceeded the "inattention and inadvertence" held not "subject to criminal penalty" in *Ellis* (which he denies), is it irrational, arbitrary, and unconstitutional to infer from his behavior after 4:00 pm, which could not have contributed to Frances Kelly's death, that he was [6] criminally negligent before 4:00 pm? *And*,

c. With respect to events long prior to the day in question, did the testimony of Erin Beacher and Amber Beacher fail to elucidate what actually happened, to establish that those events were "substantially similar" to the incident *sub judice*, and to exclude reasonable exculpatory hypotheses – and therefore is the use of their testimony to impute "notice" to Kevin Kelly irrational, arbitrary, and unconstitutional; and does its use render both charges void for vagueness as applied?

5. In affirming Kevin Kelly's convictions notwithstanding that the evidence falls below the requirements of *Bell*, 170 Va. at 611-12, 195 S.E. at 681, did the Court of Appeals contravene not only Virginia law but also the Due Process Clauses of the Constitutions of the United States, of Virginia, or of both, by creating and applying

a rule of strict liability unprecedented in Virginia's law of criminal negligence?

* * *

APPENDIX E

06/03/2002	COMMONWEALTH OF VIRGINIA VS. KEVIN CHRISTOPHER KELLY	INDICTMENT FOR A FELONY (Involuntary Manslaughter) #53304

THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about May 29, 2002, in the aforesaid Judicial Circuit, the accused, KEVIN CHRISTOPHER KELLY, did feloniously and accidentally kill and slay one Frances Deidre Rose De Lima Fiacra Martin Ritza Mary Kelly, while in the prosecution of an unlawful act or in the lawful performance of a lawful act accompanied by such carelessness or recklessness ~~by~~ [toward /s/ RTO] the said Frances Deidre Rose De Lima Fiacra Martin Ritza Mary Kelly as to be incompatible with human life, in violation of Virginia Code Section 18.2-36.

A TRUE BILL
~~NOT A TRUE BILL~~
(Strike Out One)

/s/ Janice E. Bennett
FOREMAN

WITNESSES summonsed by the Commonwealth, sworn and sent to testify before the Grand Jury:

DETECTIVE L.D. DeRAMUS

Presented By:

/s/ Paul B. Ebert
PAUL B. EBERT
Attorney for the Commonwealth County of Prince William

06/03/2002	COMMONWEALTH OF VIRGINIA VS. KEVIN CHRISTOPHER KELLY	INDICTMENT FOR A FELONY (Reckless Endangerment) #53305

THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about May 29, 2002, in the aforesaid Judicial Circuit, the accused, KEVIN CHRISTOPHER KELLY, being a parent, guardian or other person responsible for the care of Frances Deidre Rose De Lima Fiacra Martin Ritza Mary Kelly, a child under the age of eighteen, whose willful act or omission in the care of such child was so gross, wanton and culpable as to show a reckless disregard for human life, in violation of Virginia Code Section 18.2-371.1(b).

A TRUE BILL
~~NOT A TRUE BILL~~
(Strike Out One)

/s/ Janice E. Bennett
FOREMAN

WITNESSES summonsed by the Commonwealth, sworn and sent to testify before the Grand Jury:

DETECTIVE L.D. DeRAMUS

Presented By:

/s/ Paul B. Ebert
PAUL B. EBERT
Attorney for the
Commonwealth County
of Prince William

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA -vs- KEVIN C. KELLY, Defendant.	CRIMINAL DOCKET NOS. 53304, 53305 (Filed Feb. 27, 2003)

Circuit Courtroom 2
Prince William County Courthouse
Manassas, Virginia

Wednesday, November 20, 2002

The above-entitled matter came on to be heard with a Jury before THE HONORABLE ROSSIE D. ALSTON, JR., JUDGE, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:30 o'clock a.m.

* * *

[7] Commonwealth is represented by Assistant Commonwealth's Attorney, Ms. Sandra Sylvester, and the Commonwealth's Attorney, Mr. Paul Ebert.

Mr. Weimer and Mr. Boyce are present for Mr. Kelly. Mr. Kelly is also present. This matter comes back on.

Counsel, we do have a verdict in the matter.

Bring the jury in.

(Whereupon, at approximately 11:20 o'clock a.m., the jury, having reached a verdict, returned to the courtroom and resumed their seats in the jury box.)

THE COURT: Let the record reflect the jury is reseated.

Ladies and gentlemen of the jury, if you could simply answer yes on this question: Have you reached a verdict?

THE JURY: Yes.

THE COURT: Is it a unanimous verdict?

THE JURY: Yes.

THE COURT: I ask the Clerk to please read the verdicts.

THE CLERK: Please stand.

(The Defendant complied with the request.)

[8] THE CLERK: We the jury, find the accused, Kevin Christopher Kelly, guilty of involuntary manslaughter as charged in the indictment. The foreperson, Naomi Snell.

We the jury, find the accused, Kevin Christopher Kelly, guilty of reckless endangerment as charged in the indictment. The foreperson, Naomi Snell.

THE COURT: Ladies and gentlemen of the jury, as I read your name, if this is indeed your verdict, please answer yes.

Raynelle Dorefourt.

MR. DOREFOURT: Yes.

THE COURT: Harry Fulioriler.

MR. FULIORILER: Yes.

THE COURT: Willie Jones.

MR. JONES: Yes.

THE COURT: Ronald Lovett.

MR. LOVETT: Yes.

THE COURT: Deborah Martin.

MS. MARTIN: Yes.

THE COURT: Martin Nordberg.

MR. NORDBERG: Yes.

THE COURT: Robert Ratcliff.

[9] MR. RATCLIFF: Yes.

THE COURT: Naomi Snell.

MS. SNELL: Yes.

THE COURT: Vicky Supanic.

MS. SUPANIC. Yes.

THE COURT: Leslie Thacker.

MS. THACKER: Yes.

THE COURT: Ruby Wiley.

MS. WILEY: Yes.

THE COURT: Mary Ann Zech.

MS. ZECH: Yes.

* * *

EXHIBIT NO. 15
PL( ) DEF( ) COM(✓)
CASE NO. CR53304-05
DATE 11/19/02
JUDGE: _____

[Letter Handwritten In Original]

MAY 29, 2002

MY WIFE MARY IS VISITING HER PARENTS & FAMILY IN IRELAND. SHE STARTED HER TRIP LAST WEDNESDAY ALONG WITH MY OLDEST DAUGHTER MARIE. I TOOK VACATION FROM WORK TO STAY HOME WITH THE KIDS. IT HAS BEEN VERY HECTIC BUT WE THOUGHT WE WERE MANAGING FINE. TODAY AT NOON I TOOK MY WIFES 15 PASSANGER VAN BECAUSE IT HAD CAR SEATS TO PICK UP THE HIGH SCHOOL/JUNIOR HIGH KIDS FROM SETON SCHOOL IN MANASSAS. I BROUGHT OUR 3 PRE-SCHOOLERS MARTIN, FRANCIS, & CLARE WITH US. ANTHONY, ROSE, & KEVIN CAME OUT FAIRLY PROMPTLY BUT KATE WAS DELAYED. WE WAITED AT SETON UNTIL APPROXIMATELY 12:40 PM I THEN DECIDED TO BRING EVERYONE HOME & GO BACK FOR KATE. ON THE RIDE HOME I INSTRUCTED MY OLDER KIDS TO GET EVERYONE IN THE HOUSE WHILE I WENT BACK FOR KATE. I WENT BACK TO SETON & KATE WAS STILL NOT DONE. I WENT TO FOOD LION TO GET LUNCH FOR EVERYONE. I RETURNED TO SETON & KATE WAS NOW READY. IT WAS APPROXIMATELY 1:00 PM. I HAD AN APPOINTMENT WITH "WOODY'S SUDDEN SERVICE" TO CHECK OUT OUR AIR CONDITIONING UNIT WHICH WAS LEAKING. WHEN I GOT HOME APPROX 1:10

"WOODYS" WAS AT OUR HOUSE WITH NEWS THAT HE COULDN'T FIX THE LEAK & WE WOULD NEED A NEW UNIT. WE GOT LUNCH ON AND I ASSUMED FRANCIS WAS TAKING HER NAP WHICH WAS NORMAL FOR EARLY AFTERNOON. I DID SOME LAUNDRY THEN LEFT TO PICK UP THE GRADE SCHOOL KIDS LEAVING THE SETON KID'S IN CHARGE AT APPROX 2:40. I GOT IN LINE FOR PICKUP AT HOLY FAMILY ACADEMY BY ABOUT 3:10. WE GOT EVERYONE IN THE CAR & HEADED HOME ABOUT 3:30 ARRIVING HOME APPROX 4:00 [2] I HAD JUST FENCED IN THE YARD TO KEEP THE KIDS IN DOING THE WORK MYSELF ON MEMORIAL DAY. THIS MORNING I LET THE PRESCHOOLERS PLAY IN THE BACKYARD BUT DISCOVERED THEY WERE ABLE TO ESCAPE THROUGH AN 8" GAB. I WAS VERY CONCERNED ABOUT THIS SO GOT ANTHONY TO HELP ME BUILD A CLOSURE PANEL TO CLOSE THIS OFF. WHILE DOING THIS I GOT TALKING TO A REPAIRMAN WHO WAS INSTALLING A HVAC UNIT NEXT DOOR. HE GAVE ME ADVICE ON HOW TO FIX MY LEAK PROBLEM. I WENT TO LOWES TO BUY THE NEEDED MATERIALS WHEN I GOT BACK IT WAS TIME TO GET JOHN PAUL TO HIS SOCCER PRACTICE AT 6:10 PM OVER AT JENNIE DEAN SCHOOL. I CAME HOME TO FIND THAT OUR VACUUM CLEANER WAS BROKEN. I HAD ASKED EVERYONE TO TIDY THROUGH & VACUUM BECAUSE A HUGE STUFFED DOG HAD BROKEN SPILLING ITS FILLING EVERYWHERE. I TRIED TO FIX THE VACUUM CLEANER & NEEDED A PEICE TO FIX IT. I TOLD THE KIDS TO SAY THE ROSARY TOGETHER WHILE TESS & I WENT FOR THE REPAIR PEICE & POPA JOHNS PIZZA FOR DINNER. I PLACED THE ORDER

THEN STOPPED AT GIANT FOR SODA'S WHILE THE PIZZA COOKED. WE WERE HEADED BACK TO GET THE PIZZA'S WHEN I GOT A CALL FROM KEVIN JR TELLING ME TO COME HOME RIGHT AWAY THAT FRANCIS WAS LEFT IN THE CAR & WASN'T BREATHING. WE RUSHED HOME AND ARE DEVESTATED.

Kevin Kelly 5-29-02
Francis' Father 9:30PM

EXHIBIT NO. 46
PL( ) DEF( ) COM(L)
CASE NO CR5330f-05
DATE 11/18/02
JUDGE:

BEST AVAILABLE COPY

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA -vs- KEVIN CHRISTOPHER KELLY Defendant.	:	CRIMINAL CASE NOS. 53304, 53305 (Filed Feb. 27, 2003)

PRINCE WILLIAM COUNTY JUDICIAL CENTER

COURTROOM 2

Monday, November 18, 2002

The above-entitled matter came on to be heard, with a Jury, before the HONORABLE ROSSIE D. ALSTON, Judge, in and for the Circuit Court of Prince William County, in the Courthouse, 9311 Lee Avenue, Manassas, Virginia, beginning at 9:19 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

Paul B. Ebert, Esquire
Commonwealth Attorney

Sandra R. Sylvester, Attorney At Law
Assistant Commonwealth Attorney

[2] On Behalf of the Defendant:

Carroll A. Weimer, Junior, Esquire
William C. Boyce, Junior, Esquire

CONTENTS

WITNESS	DIRECT	CROSS	RE-DIRECT	RE-CROSS
JOAN M. MCIVOR	253	–	–	–
BRIAN P. MCIVOR	279	–	–	–
MICHAEL L. BYRNE	303	328	–	–
SAL MARINI	330	–	–	–

* * *

[241] Please bring the jury back in.

(Whereupon, at approximately 3:34 o'clock p.m., the Jury returned to the Courtroom and resumed their seats in the Jury box.)

THE COURT: Ms. Sylvester.

MS. SYLVESTER: Thank you, Your Honor.

May it please the Court, good afternoon ladies and gentlemen of the jury. I know it's been a long day and I promise to be brief.

There are many good things about coming from a large family. I would suggest to you that one of those is the fact that you're never alone. There's always someone to play with, always someone to talk to.

If only that was true for Frances Kelly, the youngest of thirteen children born to Kevin and Mary Kelly, because on May 29th, 2002, in the City of Manassas, Frances found herself all alone, all alone, strapped in a car seat in the family van parked in front of the family home and she died all alone in that car seat

* * *

[245] Frances Kelly, who was twenty one months old, yes, less than two years old, died as a result of being in the closed family van, in the heat for a period of time.

About that there will be no dispute. About the fact that Frances died as a result of being left in the van will not be disputed by the defense.

About a week prior to this Mary Kelly, the wife of Kevin Kelly and the mother of Kelly children, and Marie Kelly, one of the oldest of the Kelly children, went to Ireland to visit Mary Kelly's ailing and elderly father and mother.

When Mary and Marie were gone to Ireland Kevin Kelly took off from work, took off from his job as an engineer so that he could be home for his children.

In the Kelly family there were thirteen children. They ranged in age from Marie, nineteen, who was with her mother in Ireland, to little Frances who was twenty one months old.

* * *

[248] Later during the trip – and yes it was a short trip home, but later during that trip, before pulling up in front of their house, Kevin Kelly told the older children that he wanted them to get the younger children into the house and settled and that after he parked the van he was going to immediately get into the other car, the other vehicle that was parked in the driveway, so as not to waste time, and so he could get back for Kate.

So that's what he did. He parked – just before parking he told the older children to take the younger kids out and

get them settled, and that he would be back very shortly with Kate and with some lunch.

Now where he parked the van in front of house was not in the driveway. He couldn't park in the driveway because the other vehicle was parked in the driveway.

He pulls up in front of his house, on the curb on the street. Kevin went and got out of the van and into his other vehicle.

* * *

[253] * * *

THE COURT: The commonwealth's first witness.

MS. SYLVESTER: Your Honor, Joan McIvor.

Whereupon

JOAN MARIE MCIVOR

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Good afternoon, ma'am. Would you tell the ladies and gentlemen of the jury your name?

A Joan McIvor McClare – Joan Marie McClare McIvor. I'm sorry.

Q Thank you, Ms. McIvor.

I want to direct your attention today to May 29th, 2002.

Did you have the occasion to be in the City of Manassas?

A Yes.

Q Do you live in the city of Manassas?

A I do.

* * *

[255] BY MS. SYLVESTER:

Q Now, ma'am, on May 29th, 2002, what were you doing in the City of Manassas in the evening hours?

A I was finishing up my dishes and giving my younger one a shower and my husband was getting things ready so that we could go for our evening walk.

Q And around what time was it that you went for your evening walk?

A It was a little bit later that night, it was between I think 7:00 to 7:30 but I'm not sure. We were going a little bit later.

Q Did you take a usual path in your walks?

A We did.

* * *

[256] * * *

Q Ms. McIvor, could you approach the bulletin board?

(The witness approached the bulletin board as requested by counsel.)

I'm going to hand to you a red pen, could you approximately show the ladies and gentlemen of the jury where you might reside? Stand over this way so they can see.

A I live at 9058 Park Avenue. (Indicating) So it comes like this (Indicating) and I guess it goes this way. (Indicating)

Q Okay.

A So I came from Park Avenue. I took a right on to Park Street (Indicating), do you want me to write on this?

Q Go ahead, you can draw.

A And I went down this way (Indicating). I go [257] up a foot path and here's the foot path (Indicating), as I come up the foot path I take a left on Zimbro.

(Indicating)

The evening I stopped and then went back home that way.

* * *

Q Now you told the ladies and gentlemen of jury you stopped; is that correct?

A Yes.

Q Why did you stop?

A Because as I approached that's when I found the baby.

Q All right; go ahead and take your seat, Ma'am.

(The witness returned to her seat in the witness box.)

Who were you walking with on this day?

[258] A My husband.

Q All right; and ma'am, where did you find the baby, at what residence?

A At the Kelly residence.

* * *

Q Can you describe what the day was like? What was the weather like when you went for your walk?

A It was very warm. It felt like a summer night rather than a day in May. It was so hot I almost didn't feel like walking because I wasn't used to the heat.

Q Thank you, ma'am.

And then what happened as you approached on Zimbro?

A As I got up on Zimbro, as we were coming towards the Kelly house I noticed the van was in the [259] street. I had never seen it in the street before and that's probably why I noticed it. Usually it's parked in their driveway.

So I looked at the house. It seemed all closed up as if they were away and as we approached the van I just looked in.

My husband continued to walk. I called him back and I said I think there's a baby in the van and he said no, no, it's a doll, probably a doll. Let's just go.

And I said no, it might be a baby and what if it's a baby. We need to go back.

So I couldn't see – I had seen the baby I think as we were approaching it more so then on the window side because it was very dark.

Q Were there tinted windows in the van?

A Yes, and they're very dark that time of night, not that it was dark out, but there was no light hitting on it.

So I actually went back to the front window in the driver's seat and I said the baby is sleeping. I said I bet they forgot the baby. I said I'll stay here in case she wakes up because I didn't want her to be afraid.

Q Go on.

[260] A Sorry. So I stayed there. In case she woke up I wanted her to see somebody.

So my husband, reluctantly, went to the house and knocked on the door. I guess I was thinking that the window was open on the other side and I didn't feel a sense of panic at that moment. I was more concerned – I wanted her to see somebody when she woke up.

So my husband went to the door and rang the bell or knocked on the door. At that point I think I was still just kind of watching the baby. She looked like she was sleeping.

Then the door was open but nobody was there and my husband was still standing there. So I got irritated and I kind of ran up the grass and like, you know, what's going on, if somebody home and he said well there was a little one that answered the door and I just said is your mommy

or daddy home. So I'm waiting for somebody to come to the door.

At that point an older boy who I recognized to be their son came to the door and he said yes and I said you left your baby – the baby – or I said the baby is in the van and at that moment I felt the panic. The poor kid looked –

[261] Q Don't tell us what he said, but what happened after that?

* * *

A We ran down to the van together. The door –

Q You said you felt the panic. Why?

A Because of what he said and how he said it.

Q Go on.

A We ran down to the van. The door was locked. I said go get the key. At that moment I turned and I had noticed there was two women and a man that were standing behind the fence of the house next to them and I started screaming hysterically call 911, call 911 and they just kind of looked at me.

I didn't realize at the time they couldn't hear me. So I thought call 911 and so I ran up to them and I said the baby's in the van, we can't get the baby out, cal [sic] 911 and I couldn't understand why they weren't getting as excited as I was.

Anthony came back down –

Q Anthony is the boy you spoke to at the house?

[262] A Yes.

Q Did you recognize him to be a son of the defendant Kevin Kelly?

A Yes.

Q Go on.

A So he got the keys, he unlocked the door, he got in and he came right back out and he looked like he was going to get sick.

I said is she okay. He said I don't know. I said go call 911, go in the house, call 911 and then call your Aunt Maureen. I knew that he had another aunt in the area but I didn't remember her name. I wanted someone to come over and be with the children. I said call your Aunt Maureen. He said okay, okay, and he ran in.

I looked at my husband who was on the other side of the door of the van and I said check the baby. My husband was like, you know, boy scout, when the kids are sick he's the one I always say you take care of it.

So he looked in and he came out and had the same expression as Anthony.

* * *

[265] * * *

Q Now how long have you been taking a walk on this route?

A Probably a couple of years, not every night, [266] but trying.

Q And you were familiar with the Kelly residence prior to this night?

A Yes.

Q And why was that?

A We've walked by before –

* * *

[270] * * *

BY MS. SYLVESTER:

Q I am going to show you what has been previously marked Commonwealth's 4B for identification purposes and ask if you can identify that?

(Ms. Sylvester handed a photograph to the witness for her examination.)

A That's the Kelly house and the van and that's where it was when I came that night.

Q Point to which house is the Kelly house?

[271] A This one. (Indicating)

Q Thank you, ma'am, and that's a true and accurate depiction of the way it looked absent the police tape of course?

A Yes.

MS. SYLVESTER: I'd offer that at this time?

MR. WEIMER: Judge, I don't have any objection to this picture coming or the pictures of the van that are about to be shown, but what we're doing now is publishing them before they're even admitted and I would ask the Court to not allow that.

(The photograph heretofore marked Commonwealth's Exhibit No. 4B for identification was received in evidence.)

* * *

[279] DIRECT EXAMINATION

BY MR. EBERT:

Q State your full name, sir, and give your address?

A Brian Patrick McIvor, 9058 Park Avenue, Manassas.

Q And how long have you lived there, sir?

A Maybe twenty years.

Q And do you know the defendant in this case?

A Yes, I do.

Q And how long have you known him?

A A wild guess, I'd probably say about eight years.

Q And how did you come to meet him, sir?

A They go to the same church that we do and I met him through my wife because she knows everybody, talks to everybody.

Q And you know where he lives?

A Yes.

Q Had you been to his home in the past?

A Walked by it, yes.

Q Now, sir, you are married to the lady that just testified; is that correct?

[280] A Joan, yes.

Q And it's your custom to walk every evening?

A At that time, yeah, we were walking pretty much every evening.

* * *

Q And on that night did there come a point in time where you had occasion to pass the Kelly home?

A Yes.

Q And did you notice a vehicle or any vehicle at the home?

A There was a van there. My wife – as we were walking by my wife noticed that there was a baby in the car – or in the van.

[281] Q We'll get to that in a minute.

A Okay.

Q Did you notice the van prior to your wife calling your attention to something?

A She's more aware of things around here. I was huffing and puffing because she's a fast walker.

Q All right; and did you have occasion to see the van after your wife called your attention to it?

A Yes.

Q And how would you describe – where was it parked, sir?

A It was parked on the street I guess further away from the driveway than closer to it.

* * *

Q And I'll show you what's been introduced as 4B [282] and ask you if that likewise depicts the van?

(Mr. Ebert handed a photograph to the witness for his examination.)

A Yes.

* * *

BY MR. EBERT:

Q Now that van parked – where is that in relation to the driveway which serves the defendant's home?

We can see part of the driveway, just a little corner of it. (Indicating)

* * *

[283] * * *

A We were walking in from this direction (Indicating). This is the driveway. (Indicating)

Q Did you notice any car in the driveway when you saw the van?

A No.

Q All right; and would you tell the ladies and gentlemen of the jury in regard to where that van is, where were you physically located when your wife called your attention to something?

A We just passed the passenger's door.

Q And which side of the van were you walking on?

A We were on the far side walking –

Q On the sidewalk there?

A The sidewalk going this way. (Indicating)

Q And what point had you reached before she called your attention to the child?

A The passenger door. It was pretty quick when [284] we got to that.

Q And was she adjacent to you at that time?

A Pretty much.

Q And did you reply to what she said at that time?

A Yes, she said there's a baby in the car and I said no, it's probably a doll, just keep walking.

Q You said it was probably a doll, just keep walking?

A Right.

Q And did she reply to that?

A She said no, I think it was a baby. I think she's sleeping. The baby, they must have left the baby in the car to wake up or something. They probably forgot about her.

So we went back to the front because you could see through the windshield and we noticed that it was a baby.

Q Excuse me, what were the weather conditions on that occasion?

A It was hot. It was . . .

Q And how about the humidity?

A I don't remember that. I just remember it [285] being hot.

Q And when you saw the baby what if anything did you do?

A Okay; at that point where we decided it was a baby and not a doll my wife said for me to go up to the door and –

Q Did the baby at that point in time still look like a doll to you, sir?

A No, at that point we knew it was a baby.

Q All right; and then what did you do?

A My wife told me to go up to the door to let them know that they had a baby in the car.

Q Did you do that?

A Begrudgingly, yes, I did.

Q Now you say begrudgingly, why? What made you feel reluctant?

A Well, okay, I really don't like to get involved a lot in –

Q That's all right, I shouldn't have asked that question, but any way did you in fact begrudgingly or otherwise go to the door?

A Yes, knocked on the door, a toddler came, opened the door. I asked for a parent and the child left [286] and then it was a while and then an older son came out.

Q How much time elapsed would you say?

A Maybe about forty five seconds to a minute. It was a while when we were there but it probably wasn't that long.

Q It was an older child. Tell me, did you see the defendant there or any other adult at that time?

A No. When we were walking by there was nobody in the front yard.

Q Any other children in the front yard at that time?

A No, there was no one.

Q Then when you saw the older child do you know who that child was now?

A Do I know him now, no, I probably couldn't point him out.

Q What was the approximate age of that child?

A About sixteen.

Q All right; and what happened then?

A When he came to the door my wife called and said you left your baby in the car –

MR. WEIMER: Judge, I would object to anything – we're getting into hearsay about what the boy that came [287] to the door said.

BY MR. EBERT:

Q Don't go into what he said, just you can say just what you said not –

A Okay; so when he came to the door my wife told him that the baby was in the car. He looked very panicked at that point. So we knew it was a little bit – something a little bit more serious than just letting a baby sleep in the car, because we've heard that some people like to – if they're sleeping don't wake them up right away.

Q At that point in time you had no reason to believe the child was doing anything but sleeping; is that correct?

A Right.

Q All right; go ahead.

A When he came to the door we knew it was something a little bit more serious just because of his reaction.

So he ran down to the car. The door was locked. My wife told him to go back into the house and get the keys. So he ran back in the house, got the keys and opened the door and went in the side.

[288] Q Now prior to that time had you tried to open the van?

A No, because we thought the baby was sleeping, so it wasn't that much time before –

Q At that point in time do you know whether any windows were open in that van?

A No.

Q Did you see any open windows?

A No, there was no open window at least on the side that we could see.

Q Well, you were there for some period of time; is that right?

A At that point just a couple of minutes at that point.

Q All right; and after he left did he come back with the keys?

A Yes.

Q And what happened then?

A He opened the side doors and he went inside and –

* * *

[303] MR. EBERT: Mike Byrne.

* * *

Whereupon

MICHAEL LYNN BYRNE

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been duly sworn by the Clerk of the Court, was examined and testified, as follows:

THE COURT: Sir, you're under oath. Please lean forward and speak into the mike.

DIRECT EXAMINATION

BY MR. EBERT:

Q State your full name, sir, and give your address?

A My full name is Michael Lynn Byrne. My address is 9610 Ellicott Lane, Manassas, Virginia.

Q And what is your occupation, sir?

A I'm a heating and air conditioning mechanic.

* * *

[304] * * *

Q Directing your attention to the 29th day of May of this year did you have occasion to be working a side job on that day?

A Yes, sir, I was working at the Brown's house.

Q And where is the Brown's house located, sir?

A On Zimbro Avenue.

Q And approximately what time did you arrive there?

A I arrived at approximately right about 3:00 o'clock.

Q And what was your purpose for going there?

A I was fixing the Brown's – replacing the Brown's heating and air conditioning system.

Q And where is that house with relation to the [305] Kelly home, that is the home of the defendant?

A It's right next door.

Q From the street as you would face the Kelly home which side is that home on?

A If [sic] was facing the Kelly home it would be on the left.

Q The left, all right.

Now could you describe for the ladies and gentlemen of the jury the weather on that day?

A The weather was pretty warm and humid. I think I remember hearing on the way there it was about eighty six degrees.

* * *

Q And tell the ladies and gentlemen of the jury what you were doing after you arrived?

A I was working in the backyard and my friend was working inside and I spent probably eighty percent of my time outside, removing the unit, installing the new unit and spoke to Mr. Kelly.

[306] Q You said your friend, you had a friend working with you?

A Yes, sir.

Q And what was his name, sir?

A Robert Withers.

Q And he was on the inside and you were on the outside; is that correct?

A Yes, sir.

Q And there came a point in time where you had occasion to see the defendant?

A Yes, sir, I was – I spoke and said hi to Mr. Kelly and he had asked me – he told me he had a problem in his own air conditioner and would I mind taking a look at it and I asked him some questions, you know, to find out what was going on and he said he didn't feel comfortable trying to fix it himself. I said when I finished I will come over and knock on your door and see if I can give you a hand.

Q And when you arrived did you see a van in front of the home?

A Yes, I did.

Q And approximately how long after you arrived was it that you had that conversation with the defendant?

[307] A I want to say approximately any where between an hour and a half to two hours.

Q You arrived at what time?

A I arrived at 3:00 o'clock. I had an appointment to be there at 3:00 o'clock.

Q So this conversation would have taken place between 4:00 and 4:30?

A Yes, sir.

MR. EBERT: May I approach the clerk, Your Honor?

THE COURT: Yes, sir.

BY MR. EBERT:

Q I'll show you what's been marked as Exhibit 4B and introduced into evidence. Does that accurately depict the van as you've described?

(Mr. Ebert handed a photograph to the witness for his examination.)

A Yes, sir.

Q And is that in the location where you first saw it?

A Yes, sir.

Q And does the home upon which you were working, is that depicted in that photograph?

[308] A Yes, sir.

Q If you could take a pencil and look on that screen, just point to it, point to the Brown home.

A This is the Brown's home right there. (Indicating)

Q Now the area in which you were working, what part of the Brown home were you – or the property were you situated?

A I was working right here between the two homes, right behind the fence. (Indicating)

Q And is that where you were when you saw the defendant?

A Yes, sir.

Q And you had some discussion about coming over and fixing his air conditioner later; is that correct?

A Yes, sir.

Q And how long would you say the defendant was in your sight as you were working on the Brown home?

A He was in and out of the house several different times, but I know he was helping one of his sons work on the fence and I volunteered to loan him some of my tools, but I'd say at least two or three times I saw Mr. Kelly.

[309] Q What door did he enter when he would go back into the home?

A The basement.

Q And in and out, how much time elapsed while he was in your presence?

A I would say probably at least two hours, maybe three.

Q Now you say he was helping one of his sons. Do you know who that son was?

A I don't know the son's name but I believe he was the oldest son.

Q And have you come to learn that son's name was Anthony?

A I've never heard his name said, so I mean I wouldn't want to say yes.

Q Now you say that he was working on the fence?

A Yes, he was putting some pickets on the fence and he was drilling and he didn't have the proper tools so I offered him my drill and showed him how to do it.

Q Where was that fence located, sir, that – I know it's not depicted on that photograph, but if you could tell the ladies and gentlemen of the jury in general –

[310] A It was right in between the two homes, within five or six feet of where I was working was the fence of the Brown's and then there was another like picket fence going up.

Q And what kind of work was Anthony doing or the boy that you saw doing the work?

A He was putting up pickets, the last pickets in the fence to close the holes up in the fence.

Q Did you see any other children while you were there?

A I believe I saw another daughter and I believe I saw another young sibling that was outside the fence.

Q Now you say there was someone inside the fence and outside the fence; is that correct?

A Yes, sir.

Q And did you or Mr. Withers in your presence have occasion to address the defendant concerning what you had seen in that regard?

A Yes, sir.

* * *

[313] * * *

BY MR. EBERT:

Q When is the last time you saw the defendant in the back yard, sir?

A I would say some where – I think some where between 5:00 and 5:30.

* * *

[314] Q Do you recall which one of those persons you saw last in the backyard?

A I saw the son last.

Q You say you had given him some of your tools; is that right?

A Yes, sir.

Q What type of tools did you give him, sir?

A I loaned him a cordless drill and a drill bit so he could drive some screws.

Q Was he able to use those successfully?

A Yes, I showed him how to do it and he was able to repair the fence.

Q Did the defendant himself do any work on the fence?

A I think he might have been doing some when I originally was out there, but I wasn't paying much attention and I think he was showing his son how to finish up and the kid was doing the work.

Q And did he come – after you gave him the tools and showed him how to do it, did the defendant come out periodically and observe that?

A He went in and out of the house several times.

* * *

[315] * * *

Q Now did you ever have occasion to see the defendant actually leave the home in a vehicle?

A I saw him get in a vehicle that was in the driveway and I was – I had walked around front talking to my friend and I see him get in the vehicle. I didn't see him drive away.

Q And about what time was this that you saw him get in the vehicle?

A Some where between 5:00 and 6:00.

Q Did you ever see him at a later time after that?

A I saw him later on when everything had happened. He had drove up across the street and ran across.

Q Now when you saw him get in the car – when is the last time you saw the vehicle in the driveway, approximately?

A Probably between 5:00 and 6:00.

Q And did there come a point in time when you noticed or became aware that the vehicle was no longer in [316] the driveway?

A Yes, sir, I finished my work and I pulled my vehicle around in the Brown's front driveway and I noticed that that vehicle was no longer in the driveway.

Q Was the van still in the same position?

A Yes, sir.

* * *

VIRGINIA

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA,	x	
-vs-	:	CRIMINAL DOCKET NO. 53304 AND 53305
KEVIN CHRISTOPHER KELLY,	:	(Filed Feb. 27, 2003)
Defendant.	x	

Prince William County Courthouse
Circuit Courtroom 2
Manassas, Virginia

Tuesday, November 19, 2002

The above-entitled matter came on to be heard, with a Jury, before THE HONORABLE ROSSI D. ALSTON, JR., Judge, in and for the Circuit Court of Prince William County, in the Courthouse, Manassas, Virginia, beginning at 9:17 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

PAUL B. EBERT, ATTORNEY AT LAW
Commonwealth's Attorney

SANDRA R. SYLVESTER, ATTORNEY AT LAW
Assistant Commonwealth's Attorney

On Behalf of the Defendants:

WILLIAM C. BOYCE, JR., ATTORNEY AT LAW
CARROLL A. WEIMER, JR., ATTORNEY AT LAW

[2] * * *

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* * *

[25] Whereupon

FRANCES P. FIELD, M.D.

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. EBERT:

Q State your full name and give your place of employment?

A Frances Patricia Field. I work at the Medical Examiner's Office in Fairfax, Virginia.

Q What is your position there?

A I am Assistant Chief Medical Examiner.

Q As such, what are your duties?

A I perform post-mortem examinations or autopsies on people who die suddenly or unexpectedly, including people who die as a result of homicide, suicide, accident and many natural deaths where there's no physician to account for the cause of death.

These examinations are done to determine cause of death.

* * *

[32] * * *

Q Doctor, there's been testimony before this Court that the temperature of the child, rectal temperature, was 105.7 between one and two hours after the child was found.

Does that have any significance to you?

A Yes. Heat stroke occurs at between 105 and 106 degrees. Of course, depending on the individual's condition personally, heat stroke can occur slightly – at slightly

lower temperatures or it may take a higher temperature, but 105 to 106 is when heat stroke typically occurs.

Q When you say heat stroke, what do you mean by that?

[33] A Hypothermia or an elevated body temperature causing a series of symptoms ultimately leading to collapse.

Q What symptoms would the child likely have experienced, Doctor?

A Heat stroke or hypothermia causes headache, dizziness, difficulty breathing, abdominal cramps, nausea and vomiting, numbness of the extremities and eventual unconsciousness and death.

* * *

[38] * * *

Q To what degree do you determine that Frances died from hypothermia to a medical certainty?

A To a high degree of medical certainty.

Q To what degree do you determine that the heat caused a rapid decomposition?

A To a high degree of medical certainty.

* * *

[44] * * *

BY MR. WEIMER:

Q Do you know whether or not Frances – if Frances was asleep in the car seat when she was left there, do you know whether or not she woke up?

A No.

Q Is it possible that she didn't wake up?

* * *

[45] * * *

THE WITNESS: In my opinion, people who get overheated do tend to wake up, but it is possible that she didn't.

BY MR. WEIMER:

Q Do you have an opinion within a reasonable degree of medical certainty – let me ask it this way.

Isn't it true that Frances – and you know that she's 21-months-old, you know the information that's contained in the report; correct?

A Yes.

Q Isn't it true that it's not likely that she survived more than an hour and a half to two hours in that car?

A Yes, that's correct.

* * *

[58] Whereupon

LIEUTENANT KEVIN COLOVOS

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously

duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Sir, please state your name and how you're employed for the jury?

A Kevin Colovis. I work for the City of Manassas police department as a lieutenant.

Q How long have you been a police officer, sir?

A Twenty-eight years.

Q Directing your attention to May 29th of this year, how were you employed?

A With the Manassas City police department. At that time my assignment was the evening shift commander for the 4:00 to 2:00 shift for the City of Manassas police department.

Q On that evening, sir, did you have the occasion to respond to 9727 Zimbro Avenue?

A Yes, ma'am, I did.

* * *

[60] Q What did you observe when you arrived at the scene?

A A van parked in front of the residence and a white sheet located approximately 15 foot away from the van going towards the front of the residence.

Q What did you do at that time?

A Upon my arrival I instructed the officers that were arriving to start putting up a crime barrier tape. I spoke with the rescue personnel and they advised me that there was a victim underneath the sheet.

I contacted the medical examiner's officer and I directed other officers to do investigative methods and to contact our investigative service division.

MS. SYLVESTER: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. SYLVESTER:

Q I'm going to show you what has been entered into evidence as Commonwealth's Exhibit 4A, 4B and 4C and ask if you can identify these photos.

(Ms. Sylvester handed photographs to the witness for his examination.)

A Yes, ma'am. This is the van that was located [61] in front of the residence and the yellow tape is the tape that was put in my presence.

Q You directed that?

A Yes, ma'am, I did.

Q Thank you.

A Again, this is the same picture, a different angle.

Q Now, sir, can you point out – is the white sheet with the child underneath it visible?

A Yes, ma'am, it is.

Q Thank you, sir.

You directed the tape around the entire tree area?

A Yes, ma'am. We depicted that area as the initial crime scene area.

Q This picture depicts that?

A Yes, ma'am, at an angle from the house to the roadway.

* * *

[62] * * *

BY MS. SYLVESTER:

Q What happened next, sir?

A At that time I was approached by a gentleman who was identified to me as Mr. Kelly.

Q Do you see him in court?

A Yes, ma'am.

Q Can you point him out?

A The gentleman sitting here at the table in the dark suit (indicating).

Q Did you ascertain his identification for yourself?

A Yes, ma'am, I did.

Q What did he tell you?

A His first -- he told me his name and his first question to me was, "Is she alive?"

Q Was he under arrest at any time during the time you spoke with him?

A No, ma'am.

Q Now, did you ascertain his relationship to the victim?

A Yes, ma'am, I did, at a short period later.

[63] Q What was that relationship?

A He was the father of the deceased.

Q When he came up to you, his first words were, "Is she alive?"

A Yes, ma'am.

Q What happened after that?

A I then – I was standing near the van and I took him across the street to get him away from the scene, a little bit further away, and at that point in time I informed him that she was not alive, that she was deceased.

Q What did you do after that?

A We walked over to the front of the house and he turned to me and asked me, "Can I tell you what happened?"

Q Prior to that, did you ascertain anything else about Frances Kelly?

A I tried to – I ascertained from him the name of the infant and he was only able to provide me with the first name and the last name. He advised me that he couldn't remember her middle name because there were multiple middle names.

Q Did he tell you how old she was?

[64] A He informed me at that point in time she was one and half years of age.

Q Did he tell you where the mother of the child was?

A We did not discuss that.

Q Go on.

A We then sat in the grass and he asked me, "Can I tell you what happened?" and he informed me that at approximately 12:15 that day, he had arrived at home with a number of the siblings in the vehicle and had told Anthony to take the children inside the house and then he departed in another vehicle to go to Seton School to pick up another child and also to pick up lunch.

Q Did he ever tell you why he took another vehicle?

A No, ma'am.

Q Did he ever tell you who Anthony was?

A No, ma'am.

Q Go on.

A He then – he stated he departed and he returned at approximately 1:00 o'clock p.m.

Q So, let me get the times straight.

He said he came home at 12:15?

[65] A Yes, ma'am.

Q And departed again at 1:00?

A Yes, ma'am.

Q Go on, please.

A Excuse me. He arrived at 12:15, did the quick changeover and left and returned at 1:00 o'clock p.m.

Q Thank you, sir. Go on.

A He stated to me that he returned at 1:00 o'clock p.m. He was speaking with some gentleman in regards to repairs on his furnace or a furnace unit on the property. He then advised me that he departed again at 2:30 p.m.

* * *

[70] Whereupon

OFFICER ELIA ALFONSO

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Good morning, ma'am.

A Good morning.

Q Would you please tell the ladies and gentlemen of the jury your name?

A Officer Elia Alfonso with the Manassas City police department.

Q How long have you been with the City of Manassas police?

A Three and a half years, ma'am.

Q Ma'am, directing your attention to May 29th, 2002, were you in uniform and displaying your badge of authority on that day?

A Yes, ma'am, I was.

Q Did you have the occasion to respond to a residence at 9727 Zimbro Avenue in the City of M~~anassas~~?

[71] A Yes, ma'am, I did.

* * *

[74] Q Now, Officer, did there come a time that you would speak with the Defendant?

A Yes, ma'am, I did.

Q Was he under arrest at that time?

A No, ma'am, he was not.

Q How did that happen that you would speak with him?

A I was inside his home and I had asked him if he could provide me with a statement as to what had taken place that day.

Q Did he do that?

A Yes, ma'am, he did.

Q How did he accomplish that?

A He sat at the kitchen table and wrote out for me the events of the day.

Q I'm going to show you what has been marked as Commonwealth's Number 15 and ask if you can identify it.

(Ms. Sylvester handed a document to the witness for her examination.)

A That is the statement he gave me.

Q Did you alter or disturb this in any way?

A No, ma'am, I did not.

Q Was it done in the Defendant's own [75] handwriting?

A Yes, ma'am.

MR. WEIMER: Judge, we'll stipulate that it was done by Mr. Kelly.

MS. SYLVESTER: I'd offer Number 15 in evidence at this time.

THE COURT: Without objection by stipulation.

(The document heretofore marked Commonwealth's Exhibit No. 15 for identification was received in evidence.)

BY MS. SYLVESTER:

Q Did you also have an occasion to speak with the Defendant?

A Yes, ma'am, I did.

Q What, if anything, did he have to tell you about the events of the day?

A He had gave me a rundown of the moment that he left the house, the last time he saw Frances and everything that transpired up until the point that he received a phone call to tell him that she had been found.

* * *

[77] * * *

CROSS EXAMINATION

BY MR. WEIMER:

* * *

Q You had Mr. Kelly write down and make this written statement after he gave you the oral statement?

A It was simultaneous.

Q So, he told you and then wrote it down?

A Yes, sir.

Q You asked him to write it down?

[78] A Yes, sir, I did.

Q You asked other people to write it down?

A Pertaining to this –

Q To write down their statements?

A Yes, sir, I did.

Q Where did all this occur?

A Mr. Kelly's statement was obtained in the kitchen. The three children were elsewhere in the house.

MR. WEIMER: I have no further questions, Judge.

* * *

[85] * * *

DETECTIVE LOUIS D. DERAMUS, III

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Have you been sworn, sir?

A Yes, I have.

Q State your name and how you're employed for [86] the ladies and gentlemen of the jury?

A Louis D. Deramus, III. I'm a detective with Manassas City police.

Q What is your assignment?

A I'm assigned to the Investigative Services Division. I'm in violent crimes.

Q Were you so employed and assigned in that capacity on May 29th, 2002?

A Yes, ma'am.

Q Did you respond to a residence at 9727 Zimbro Avenue?

A Yes, ma'am, I did.

Q That's a residence in the City of Manassas?

A Yes, it is.

Q What was your role on that day?

A I was the lead detective who was in charge of case management.

* * *

[103] * * *

BY MS. SYLVESTER:

Q Now, sir, did you do anything to ascertain the weather on the day in question?

A Yes.

Q What did you do?

A I received data from the National Weather Service, National Convergence Center and NOAH, which is used by the airport, as well as copies of the Washington Post.

Q How easy was the NOAH and airport and American Convergence System's data to read?

A Very difficult.

Q So, as a result, did you rely on the Washington Post?

A Yes.

Q I'm going to show you what has been marked – it's in reverse order, but – 17D and ask if you can identify this.

(Ms. Sylvester handed an item to the witness for his examination.)

A 17D is a copy of the Washington Post from [104] Thursday, May 30th with the historical weather for the day before that ended at 11:00 p.m.

Q So, this reflects the May 29th, 2002 weather?

A That's correct.

Q With the temperatures that day, can you tell the jury what it is?

A It shows a temperature high of 84 degrees at 5:00 p.m., a low of 65 at 6:00 a.m.

Q And the humidity?

A It shows relative humidity 100 percent at 6:00 a.m. and 52 percent was the minimum at 4:00 p.m.

* * *

[105] * * *

BY MS. SYLVESTER:

Q Sir, did you attempt to ascertain how hot the van would have gotten during that day on May 29th?

A Yes, I did.

Q Were you ever able to get a day similar to that day with regard to the weather conditions that were present on May 29th?

A Not identical, but similar.

Q What did you do to conduct this experiment?

A It started out the vehicle was parked at the police department in the impound lot, opened up the vehicle, tried to flush out the hot air that could have been

contained within the vehicle by leaving the vehicle open for a period of time and then placed two thermometers within the vehicle and closed the vehicle back up as though it would have been on the day of the event.

[106] Q What did you do with the thermometers?

A Recorded the temperatures on those thermometers on a consistent basis.

Q What was the first day you did this experiment?

A The first day of the experiment was on June 4th?

Q Again, sir, did you retrieve the weather documentation from the Washington Post on June 5?

A Yes, I did.

Q Did you also compare it to NOAH documentation and American Convergence Systems and the airport?

A Yes.

Q Sir, did you also record on the same document we have here your time and interior temperatures of the vehicle?

A That's correct.

Q I'm going to show this. It's marked at 17C and already admitted into evidence without objection.

What was the temperature on that day?

(Ms. Sylvester displayed an item to the witness for his examination.)

A It shows the high of 85 degrees at 4:00 p.m., [107] the low of 67 at 5:00 a.m. with a humidity of 78 percent at 10:00 p.m. and a low of 43 percent at 1:00 p.m.

Q What time did you start the experiment?

A On this day at 10:42 is when we opened up the vehicle and started flushing the air out and then resealed the vehicle.

Q For purposes of this investigation, what times were critical to the determination of the interior temperatures?

A The highest heat times were at 4:18 p.m. or 1618 as indicated on that. The time we were most concerned was the times between 12:30 and what would have been 7:30. That's when the child was within the vehicle.

Q What was the temperature recorded at 1618?

A At 1618, 124.5 degrees.

Q Now, you repeated this experiment a couple of different days; is that right?

A That's correct.

Q Were you hoping to get a day similar?

A Hoping to.

Q That never happened; is that right? When was the next time you conducted the experiment?

A Wednesday, June 5th.

[108] Q That was significantly hotter; is that a fair statement?

A Yes.

MR. WEIMER: Significantly hotter than what?

MS. SYLVESTER: Than the day of May 29th.

(Ms. Sylvester displayed an item to the witness for his examination.)

THE WITNESS: This shows a high temperature of 91 degrees at 3:00 p.m., a low temperature of 72 at 2:00 a.m. with a relative humidity high of 87 percent and a low of 54 percent.

BY MS. SYLVESTER:

Q What was the high recorded inside the vehicle on that day?

A It looks like 118 and a half on the thermometer one and 119.7 on thermometer two.

Q On this day you used two thermometers; is that correct?

A That's correct.

Q Why was that?

A Just to ensure the accuracy of the thermometers, just to show that there could be a range, depending on the instrument used to measure the heat.

[109] Q You repeated it one more time?

A That's correct.

Q When was that?

A Monday, June 17th.

Q Again, 17A.

Is this the official weather data from the Washington Post?

(Ms. Sylvester displayed an item to the witness for his examination.)

A Yes, it is, dated Tuesday, June 18th, which as with the others, it's the historical data for the weather the day before.

Q Was there anything unusual about this day?

A The temperatures were significantly less.

Q What was that?

A High temperatures was 81 degrees at 3:00 p.m., low 63, the humidity was 72 percent with a minimum of 33 percent and I made a note that at approximately 4:15 in the evening it started to rain. So, it was a cloudy, overcast day.

Q These are the temperatures you recorded on two thermometers that day?

A That's correct.

* * *

[116] * * *

MR. EBERT: Your Honor, the next two witnesses will be prepared to testify – they're neighbors, young, one twenty and one, I think –

MS. SYLVESTER: Fifteen.

MR. EBERT: – fifteen.

THE COURT: Brown and Beacher?

MR. EBERT: The Beachers live across the street, very familiar with the family. Erin will be prepared to testify that three or four years ago a child [117] was left in the van.

She went up to the door and talked to Mr. Kelly and told him the child – the following summer the same thing happened, the child, a 5 or 6-month old child, which may have been his child, but she can't tell you which child it was, but in any event, she again went up and talked to Mr. Kelly.

On both occasions he said, "Thank you." These statements were made contemporaneously with the last finding of the child, "If this keeps up, someone is going to die." That's what the witness said and that would be basically what that witness would say.

The other one –

THE COURT: Which one is that? Which witness is that?

MR. EBERT: The younger girl. Her name is Amber.

THE COURT: This is what Amber Beacher –

MS. SYLVESTER: No. That's Erin.

MR. EBERT: Erin is going to be testifying to that.

THE COURT: How old is Erin?

MS. SYLVESTER: Fifteen. Erin is in her [118] twenties. She's like 19 or 20.

MR. EBERT: Do you have the statements?

MS. SYLVESTER: Amber will testify that approximately a week or two after her sister had that encounter, it was July, she saw a child left in the van. She was with another person. The child was a toddler strapped in a car seat. The other person approached the door and spoke to Kevin Kelly about it.

THE COURT: You say another person spoke to Mr. Kelly?

MS. SYLVESTER: She didn't hear what they said, just he approached the door and spoke to Mr. Kelly.

THE COURT: Will she be able to testify – did she overhear the conversation with Mr. Kelly?

MS. SYLVESTER: No, but she was standing in the yard near the child. She was remaining with the child.

THE COURT: So, another person went to the door is essentially what she's going to say?

MS. SYLVESTER: Yes, and Mr. Kelly was at the door.

MR. EBERT: They came out and removed the child immediately thereafter.

[119] THE COURT: You say that this incident supposedly came –

MS. SYLVESTER: Shortly after Erin's, the second incident.

THE COURT: That Erin Beacher is going to testify about?

MS. SYLVESTER: Yes.

MR. WEIMER: The second incident?

THE COURT: Yes.

MS. SYLVESTER: Like a week or two after.

MR. WEIMER: So, we're talking about two incidents?

MS. SYLVESTER: Three incidents.

THE COURT: Three incidents. There was a child left, as I understood Mr. Ebert, there was a child left in the van about three years ago and then the following summer another child was left in the van and then one to two weeks after that there was another incident that Amber supposedly had information on, which she approached.

MR. WEIMER: Judge, before you rule on this, I think it would be appropriate for them to examine their witness and for me to cross examine the witness out of the [120] presence of the jury so you can hear exactly what they're going to say to be able to make your ruling, because in order to – I believe your earlier ruling was that they needed to tie it to Mr. Kelly and there are a number of questions that I can ask.

I mean, these people will not speak to us, so I can't tell you what exactly they're going to say.

THE COURT: What do you think – what significant [sic] do you think is going to come out of this testimony that is going to – what did Mr. Ebert and Ms. Sylvester say to suggest to you that they're not going to be able to tie it to Mr. Kelly?

MR. WEIMER: Well, there's nothing to testify – there's nothing that says who put the child in, which car they were in, who parked the car there.

MS. SYLVESTER: They'll testify it was the gray van.

THE COURT: Okay.

MR. WEIMER: There's no testimony whatsoever that Kevin Kelly was driving that van or was the one that left the child in there, that this child was in there.

THE COURT: The struggle that I have with that analysis is that in these particular situations there's no [121] need from the Court's view for the Commonwealth to prove it on those particular instances Mr. Kelly put the child in the car.

Rather their burden is to show the children were placed in the car, that he was given information to let him know that this could – as Ms. Sylvester put it, "If this keeps up someone is going to die," I think is what she said.

MR. WEIMER: The issue in this case is not whether or not he left a child in the car. The issue is whether he left kids in charge of his children.

THE COURT: That's not how I see the issue. There's more to it than that and as you correctly pointed out, in a case such as this the Commonwealth has a burden to show, even though it's not an intent case necessarily, the Commonwealth has the responsibility in a gross negligence case to show some other evidence of knowledge to support their case and I think this is what they're trying to do.

Is that a fair –

MS. SYLVESTER: It's notice.

MR. WEIMER: Could I have a moment?

THE COURT: Yes.

[122] (Mr. Weimer and Mr. Boyce conferred, off the record.)

MR. BOYCE: Judge, this case is unlike most other criminal cases –

THE COURT: I agree.

MR. BOYCE: – there's no dispute as to who the Defendant is, who did whatever was done. There's no dispute essentially as to what was done.

It's a negligence case, it's – negligence, but it's negligence nevertheless. And whether this child was left in the van once, twice or a hundred times or any child left in the van for that matter, it doesn't relate to the degree of negligence present on the day of this charged offense.

THE COURT: But I think even if you take a look at the case decided by the Yarborough and I think the Conrad case was also decided, it talks about the responsibility of the government to prove something more than simple negligence.

It talks about the possibility of proof of gross negligence and I don't think it's appropriate for me to preclude the suggestion to the jury that he had notice or knowledge that these things could go wrong if they were [123] not attended to.

MR. BOYCE: Are you referring to knowledge that a baby might die if left in the van?

THE COURT: Yes.

MR. BOYCE: I think everybody knows that. We'll stipulate that, you know, that sort of – he's charged with – that's sort of common knowledge.

THE COURT: I believe that it is appropriate, assuming – again, Ms. Sylvester and Mr. Ebert, I'm trusting you in the information that you're providing as to what you believe these witnesses are going to say specifically –

MR. EBERT: Yes, sir.

THE COURT: – that that's what they're going to say. If they don't say this and they come up with something else, we probably have a problem then. I'm going to require that – I'm going to hope that this is what they're going to testify to.

MS. SYLVESTER: We may need a little more permission to lead because they've seen so many other things we need to narrow it to the car.

MR. WEIMER: Judge, this is why we need to do it outside the presence of the jury.

[124] MS. SYLVESTER: No. Just to narrow it to a car.

THE COURT: What you need to do, before the witnesses get on the stand, you need to tell them that their testimony is limited to the specific things that you talked about, the fact that a child was left in the van three

years ago, that the father saw that the child was left in the van. They went up to the door, Mr. Kelly said, "Thank you," according to their statement.

MS. SYLVESTER: Yes.

THE COURT: "If this keeps up someone is going to die." That's what your witness supposedly is going to testify to.

MS. SYLVESTER: Yes.

THE COURT: And that's pretty much all this witness is going to testify about.

MS. SYLVESTER: Yes, that's exactly right.

THE COURT: Then Erin Beacher can testify –

MR. EBERT: We've already done that, Your Honor.

MS. SYLVESTER: We've already done that.

MR. EBERT: But we'll do it again.

THE COURT: Confirm that because we don't need [125] to have a mistrial at this point.

MS. SYLVESTER: I agree.

THE COURT: All right.

* * *

[126] Whereupon

ERIN BEACHER

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been first duly

sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. EBERT:

Q Will you state your name, ma'am, and give your address?

A Erin Beacher, 9734 Zimbro Avenue.

Q Do you know the Defendant, Kevin Kelly?

A Yes, sir.

Q How long have you lived at that address?

A About fourteen years.

Q Who do you live there with?

A My parents.

Q Any other siblings?

A Two.

Q What are their names?

A Amber and Stacey.

Q Where is your house with relation to the Kelly house?

[127] A We're just neighbors.

Q Across the street or where are you located?

A Across the street.

* * *

[129] * * *

Q Thank you.

Now, you say you've lived there for fourteen years?

A Yes, sir.

Q Directing your attention to the summertime – well, let me ask you.

Have you seen in the past children in the summertime left in a car or van at the front of the Kelly home?

A Yes, sir.

Q From the best of your recollection, when is the first time that you saw that happen?

A About three or four years ago.

Q As a result of that – was this a young child?

A Yes, sir.

Q Was the child in a car seat?

A Yes.

[130] Q As a result of what you saw, did you do anything?

A I walked up to the door and I told him he left a child inside the car and he said, "Thank you," and went out and got her.

Q You went up to the door, knocked on the door?

A Yes, sir.

Q Did the Defendant come to the door?

A Yes, sir.

Q What did you tell him?

A I told him he left a child inside the car.

Q What was his reply?

A "Thank you."

Q What was the temperature on that occasion?

A It was a hot summer day.

Q The following summer, did you likewise see a similar event?

A Yes, sir.

Q Was anyone with you on that occasion?

A My friend.

Q What was your friend's name?

A Allison Caruso.

Q Did you make any comment – what did you see [131] on that occasion?

A I said, "If this keeps happening again this summer – "

MR. WEIMER: Judge –

THE COURT: Hold it. Hold it. Stop.

THE WITNESS: " – a child will die."

THE COURT: Young lady, when I tell you to stop, don't speak.

THE WITNESS: Sorry.

MR. WEIMER: I didn't understand the question. I'm not sure she did. I wasn't clear whether he said, "What did you see?" or, "What did you say?"

THE COURT: I think he said, "What did you see?" and she interpreted it, "What did you say?"

Listen very closely. Young lady, listen very closely to the questions that are asked by either one of the lawyers involved. If you hear an objection, don't say anything else until we resolve the objection.

THE WITNESS: Okay.

BY MR. EBERT:

Q On the second occasion what did you see?

A I saw a child inside the car.

Q Was that child likewise in a car seat?

[132] A Yes, sir.

Q Do you know, was it a small child, infant child?

A It was about a small child.

Q As a result of what you observed, did you make any statement at that time?

A Yes, sir.

Q What was that statement?

A I said to my friend, "If this keeps happening every summer –

THE COURT: Stop.

MR. WEIMER: Judge, she made the statement to her friend. That's not what –

THE COURT: Approach.

BENCH CONFERENCE

THE COURT: As I understood the proffer, maybe I wrote it down wrong, as I understood the proffer, I thought the testimony was going to be that she stated this to Mr. Kelly.

MR. EBERT: No. I'm sorry if that was the case. Your Honor, that was to show her state of mind and concern about the situation as it existed when she explains why she went –

[133] MR. WEIMER: I think the jury can hear everything that is being said.

THE COURT: No, they're not paying attention.

MR. EBERT: Which would explain why she went to the – left there and went to the Kelly home again.

THE COURT: I'll allow her to testify as to what she observed. I'll allow her to testify as to what she did, but this statement that she made apparently to this other person, I'm not going to allow that.

MS. SYLVESTER: Judge, could I be heard on that for a moment?

THE COURT: Sure.

MS. SYLVESTER: It's also a present sense impression. It's like when you see an accident happen and you say to the person next to you, "Oh, my God, they're

going to crash." It was a present sense impression that this was a dangerous situation and I would suggest to the Court it comes in under that exception to hearsay.

THE COURT: I think that something that was said by Mr. Weimer or Mr. Boyce earlier deals with that issue. She testified that it was a hot day and she testified that it was a bad situation and you could convince the jury that she would surmise that that would [134] be the circumstance, but the nature of this particular statement is what makes it inadmissible.

MS. SYLVESTER: Thank you.

MR. WEIMER: Judge, just a moment.

(Mr. Weimer and Mr. Boyce conferred, off the record.)

MR. WEIMER: That's all.

THE COURT: Ms. Sylvester, could you instruct the witness that she's not to volunteer that information unless –

MS. SYLVESTER: We will.

THE COURT: Speak with her now.

(Ms. Sylvester and the witness conferred, off the record.)

OPEN COURT

MS. SYLVESTER: Thank you, Your Honor.

BY MR. EBERT:

Q Without telling us what you said, what did you do on the second occasion?

A Just went up to the house and knocked on the door and he came and got the child.

Q Did you talk to the Defendant again?

A Yes, sir.

[135] Q What did you tell him on that occasion?

A "You left your child inside the car."

Q What was his reply to that?

A "Thank you."

Q What did you do then?

A Walked away.

Q What was the weather on that occasion?

A A little bit calmer than the last time.

Q What?

A The weather was a little bit calmer than the last time, but it was still a pretty hot day.

Q What caused your attention to the van on these two occasions?

A I heard a slight crying from the van.

Q Where were you physically located when you heard the crying on the first occasion?

MR. WEIMER: Judge, this goes to the issue that we approached the bench about.

THE COURT: I think the purpose it would be admissible has been established by the original response.

MR. EBERT: The Court's indulgence for a moment.

[136] (Mr. Ebert and Ms. Sylvester conferred, off the record.)

MR. EBERT: That's all I have of this witness.

THE COURT: Cross?

MR. WEIMER: Yes, Your Honor.

CROSS EXAMINATION

BY MR. WEIMER:

Q Erin, the car that you saw the baby in, that was the gray van?

A Yes, sir.

Q It was parked in the driveway?

A Yes, sir.

Q That's the car that you normally see Mary Kelly drive, isn't it?

A Yes, sir.

Q In fact, Mary was the one who parked the car that day, wasn't she?

A I couldn't tell you that, sir.

Q You don't know?

A No.

Q Do you know what day of the week it was that this happened?

A It was during the summer. It was during the [137] weekday.

Q Weekday or a weekend?

A Weekday.

Q What time of day was it? This is the first incident.

A It was during the day.

Q You don't know the age of the child, you just know that they were in a car seat?

A Yes, sir.

Q Both times you spoke to Mr. Kelly?

A Yes, sir. I'm positive of that.

Q I understand and both times after you told him, he said, "Thank you," and he went immediately out and got the child; is that correct?

A Yes, sir.

Q You didn't speak with anyone else at the house at that point?

A No, sir.

MR. WEIMER: If I can have just a moment, Judge.

(Mr. Weimer and Mr. Boyce conferred, off the record.)

MR. WEIMER: Nothing further.

* * *

[139] * * *

Whereupon

AMBER BEACHER

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Would you tell the ladies and gentlemen of the jury your name?

A Amber Beacher.

Q How old are you?

A I'm fifteen.

Q Where do you reside?

A Excuse me?

Q Where do you live?

A On Zimbro Avenue.

Q What's the address?

A 9734.

Q Zimbro?

A Yes.

[140] Q Who do you live there with?

A I live there with my mom, my sister Erin and my dad.

* * *

[141] * * *

BY MS. SYLVESTER:

Q Amber, I want to direct your attention to a while ago and ask if you had the occasion to see a child in a car at the Kelly residence?

A Yes.

Q How long ago was that?

[142] A Two to three years ago.

Q Was that at the same time that your sister just testified to or different?

A I don't know what she testified to.

Q Were you with your sister or was this a different time?

A It was a different time.

Q What did you see?

A I saw a kid left in the car.

Q Do you have an idea as to how old this child was?

A Two to three.

Q Where was the child in the vehicle?

A In the car seat.

Q In the car seat?

A Yes.

Q Which vehicle was this?

A I do believe it was their old van.

Q What time of year was this?

A During the summer.

Q Can you describe what the weather was like?

A It was warm out, it wasn't too hot.

Q What drew your attention to the van on that [143] day?

A I occasionally like walked by and just looked, but that day I heard a kid cry.

Q Were you with someone else on this day?

A I was with my sister Stacey and another boy.

Q When you saw the child in the van, what happened next?

A The boy walked up and rung the doorbell and I went over and checked on the kid.

Q Did you see who answered the door?

A Mr. Kelly.

Q Thank you.

You did not hear the conversation; is that a fair statement?

A No.

Q This happened in the City of Manassas?

A Yes.

Q Thank you, Amber.

MS. SYLVESTER: That's all I have of this witness.

THE COURT: Mr. Weimer?

(Mr. Weimer and Mr. Boyce conferred, off the record.)

[144] MR. WEIMER: No questions, Your Honor.

* * *

[149] MS. SYLVESTER: Dr. Foster.

(Whereupon, the witness was sworn by the Clerk of the Court.)

(Whereupon, at approximately 12:22 o'clock p.m., the jury returned to the courtroom and resumed their seats in the jury box.)

THE COURT: Let the record reflect the jury is reseated.

MS. SYLVESTER: Thank you, Your Honor.

Whereupon

ROBIN FOSTER, M.D.

a witness, was called for examination by counsel on behalf of the Commonwealth, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MS. SYLVESTER:

Q Ma'am, having been sworn, would you please tell the ladies and gentlemen of the jury your name?

A It's Dr. Robin Foster.

Q Where are you employed?

A I am on faculty at the Medical College of Virginia, Virginia Commonwealth University Health Systems.

* * *

[150] * * *

BY MS. SYLVESTER:

Q I'm sorry. Tell us again where you're employed?

A At the Medical College of Virginia, Virginia Commonwealth University Health Systems in Richmond, Virginia.

Q What are your duties there?

A I am an assistant professor in pediatrics and emergency medicine. I am the Director of Pediatric Emergency Services there and the Director of the Child Protective Team.

* * *

[162] * * *

Q Are you familiar with the minimal physical requirements of a 21-month-old child that they would have during the course of a seven hour waking period?

A A normal 21-month-old would require approximately 12 ounces of fluid at a minimum for maintenance fluids during that period of time. If that period of time was during the day, they would usually consume at least two meals, whether it be a meal and a [163] snack or two meals.

They would also require several diaper changes because they're still diaper dependent at that time and they would most likely, during the course of seven hours in a day, take a nap during that period of time.

* * *

[170] * * *

Q Do you have an opinion, Doctor, as to whether a child left in a hot car for seven hours could sleep through these bodily changes that you've described?

A In my opinion, the child would not sleep through that entire period of time.

Q Why is that?

A The child may certainly be asleep at the onset [171] of being left in that warm environment, but as the body temperature elevates and the body mounts its own mechanism, such as increased heart rate and increased respiratory rate and profuse sweating, in my opinion the child would awaken during that process, very similar to when we get overheated.

For example, if you go to bed at night and have a big down comforter on you and get overheated in the middle of the night, you'll frequently awaken because you feel that your heart rate has increased because you feel that you're sweating and because – you awaken because of those

uncomfortable sensations and then have the ability with awakening to remove the down comforter and to cool yourself.

Q Doctor, do you have an opinion as to whether or not a child locked in a hot car would have the ability to cry out?

A Along with the awakening of the child and the uncomfortable sensations of the heat and increased heart rate and respiratory effort, in my opinion it would be a child's normal response to cry during that period of time.

Certainly after the heat stroke has progressed and the child becomes less responsive, in my opinion the [172] child would not be crying at that point in time.

* * *

Virginia: In the Circuit Court of Prince William County

Commonwealth of Virginia

v.

Kevin Christopher Kelly, Defendant.

Criminal Nos.

53304, 53305

MEMORANDUM OF LAW

Commonwealth's Response to the Defense Motion In Limine

* * *

[3] 5. The evidence that the Commonwealth seeks to introduce deals with a number of instances where the Kelly children were endangered while under the supervision of their father, Kevin C. Kelly. On May 29, 2002 the victim was left in her car seat for seven hours while her father worked around the house. The defendant claims that he left the child in the care of her older sibling, Anthony. The evidence will show that the victim and other children were endangered under similar circumstances for years prior to May 29, 2002. The evidence will also demonstrate an objective awareness, by the defendant, that his behavior was negligent and potentially harmful.

6. The defense, in their Motion in Limine cited *Hagy v. Commonwealth*, 222 Va. 599, 283 S.E.2d 187 (1981). (M. in Limine 2.) *Hagy* states that prior injuries to children other than the victim are not admissible in a subsequent trial. The defendant in *Hagy* hit a child in the stomach with a broomstick, which caused her death. That case is distinguishable from the present case because the prior injuries to other children were not admitted to prove

anything on the list of exceptions to the general rule of exclusion. In the present case, evidence of prior bad acts will be used to show the defendant had knowledge that his actions were endangering his children and specifically the victim. Both charged offenses require the Commonwealth to show the defendant endangered the victim. The prior bad acts evidence will show the defendant had notice his children were [4] left unattended in stores, locked vehicles, and in the street. Therefore the prior bad acts evidence is relevant to the Commonwealth's case and is admissible under the *general knowledge* exception and to show an element of the charged offense.

7. The defendant cited *Pavlick v. Commonwealth*, 25 Va. App. 538, 489 S.E.2d 720 (1997) (M. in Limine 3.) to show that prior bad acts were inadmissible in cases where a child is killed and there is no evidence connecting the defendant to the older injuries. The *Pavlick* case cited has no precedential authority because the opinion was overturned by an *en banc* decision. (See *Pavlick v. Commonwealth*, 27 Va. App. 219, 497 S.E.2d 920 (1998) In fact the second *Pavlick* opinion held that the trial court did not abuse its discretion by allowing evidence of prior bad acts.

8. The defendant cited the Opinion in *Zirkle v. Commonwealth*, 189 Va. 862, 55 S.E2d 24 (1949) (M. in Limine 5.) to demonstrate when character evidence is admissible. The case was also used to show a prior conviction for DWI was inadmissible in a subsequent trial for involuntary manslaughter.

The Commonwealth does not dispute the holding in *Zirkle*. The Commonwealth does dispute the use of the opinion in the context of the present case. *Zirkle* is not relevant because the defendant's character will not be

attacked by prior bad acts evidence, instead the evidence will be used to establish an element of the offense.

* * *

[7] 16. The defendant states that guilt should be determined through an "objective assessment" and depends "wholly upon whether a reasonable person would have appreciated the risk arising from the defendant's conduct". (M. in Limine 5.) Under that analysis, prior bad acts are critical to prove whether a reasonable person would have appreciated the risk. An impartial assessment of the events surrounding the death of Frances cannot be made in a vacuum. The trier of fact must be able to consider all facts available to the defendant on the day his daughter was left to die in a locked van. Those facts and circumstances must include evidence of prior bad acts where the defendant's children were endangered by his actions. The numerous occasions when the defendant's children were endangered served to give him notice of the danger arising from his conduct. The trier of fact should have the opportunity to consider whether a reasonable person under those circumstances should have appreciated the risk.

* * *